

**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF NORTH DAKOTA  
SOUTHWESTERN DIVISION**

Casey Voigt and Julie Voigt,	)	Civil No. 1:15-CV-00109
	)	
Plaintiffs,	)	
vs.	)	<b>PLAINTIFFS' SUPPLEMENTAL BRIEF</b>
	)	<b>IN OPPOSITION TO DEFENDANT'S</b>
Coyote Creek Mining Company, L.L.C., a	)	<b>MOTION TO DISMISS AND IN</b>
North Dakota Corporation,	)	<b>SUPPORT OF PLAINTIFFS' MOTION</b>
	)	<b>TO AMEND COMPLAINT</b>
Defendant.	)	

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**I. Introduction**

The Court requested additional briefing on Potential to Emit, federally enforceable emission limits, and the extent of New Source Performance Standard (“NSPS”) Subpart Y. Before moving to these issues, though, it may be prudent to answer a simpler question: why have plaintiffs brought this case?

While this case is focused on Coyote Creek Mine’s coal processing facility, the Potential to Emit Particulate Matter (“PM”) from that portion of the mine has broader significance. This is because Potential to Emit PM must be calculated at the coal processing facility, and if the mine’s Potential to Emit PM is greater than 250 tons per year, then the mine must obtain a Prevention of Significant Deterioration (“PSD”) permit. PSD permitting requirements, such as installing strict emission control equipment, apply to the entire mine as opposed to merely the coal processing plant. *See* 40 C.F.R. § 52.21(b)(5,6) (defining “stationary source” for PSD purposes as any “facility” belonging to the same “industrial grouping,” on “contiguous or adjacent properties,”

and under “common control”); *see also* DE 1-2,<sup>1</sup> Minor Source Permit to Construct, pg. 2 (existing minor source air permit to construct applies to entirety of mine).

Specifically, prior to obtaining a PSD permit the mine would have to determine the Best Available Control Technologies (“BACT”) for each source of PM pollution across the entirety of the mine and then commit to installing this equipment. 42 U.S.C. § 7475(a)(4). BACT controls require the “maximum degree of reduction of each pollutant” taking into account costs, and therefore are much more protective of the public (and the Voigts) than the current controls required at the mine. These controls would have to be installed at the mine face, haul roads, and the coal processing facility—in other words, anything that emits PM. There are other prerequisites to obtaining a PSD permit as well, such as requirements to undertake more rigorous study of the air quality impacts of the full mine. *Id.* § 7475(a)(3,6,7).

This is of great importance to the Voigts, and this importance becomes clear when one considers just how close to mining activities the Voigts will be for the next several decades. The Voigt’s house is a mere thousand feet from the initial placement of overburden from the mine. DE 1, Plaintiffs’ Complaint, pg. 3. The mine will operate huge haul trucks on private dirt roads, draglines, and other equipment to move, rip apart, and drop earth, all while the Voigts work and live on the same property. *Id.* All of these activities create PM dust.

Nor are these concerns merely speculative or theoretical. The mine’s private haul roads and haul truck activities alone are already creating blinding clouds of dust over the Voigts’ cattle, as captured by photos taken by Julie Voigt this February and attached hereto. Exhibit A, Affidavit of Julie Voigt and Attached Photos, March 7, 2016. Full mining operations have not

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<sup>1</sup> Page number references are to the page numbering created by PACER, as opposed to any other page numbering within the documents cited.

yet even begun. A PSD permit would require the mine to install best available controls to prevent this air pollution at the outset. 42 U.S.C. § 7475(a)(4) (BACT requirement).

The state's current air permit to construct for this mine does nothing of the sort. It does not require installation of BACT controls anywhere at the mine. It does not require more detailed analysis of the air quality effects of the mine. It did not even require public notice. Several times, the state's permit simply asks the mine to use measures "such as...", and then goes on to list several *suggestions* to control dust. DE 1-2, Minor Source Permit to Construct, pgs. 3-4. This is vague to the point of unenforceability, and this lack of protection arises precisely because the mine applied for the wrong type of permit.

Coyote Creek Mine was only able to apply for a minor source permit to construct because it drastically underestimated its Potential to Emit PM. It excluded emissions from its coal pile in direct contravention of clear regulations, and further did not determine the effectiveness of its emission control equipment at its coal crushing facility, simply describing them as "negligible and unquantifiable" with no actual supporting data. The mine has submitted no information to the Department of Health to show whether or not its coal crushing facility will emit below major source levels. As will be explained *infra*, these are serious violations of federal environmental law.

Unfortunately, NDDH too has failed in its responsibilities. Not only did it fail to require Coyote Creek Mine to obtain the requisite PSD permit or, alternatively, to prove that its emissions will be below major source levels, but it continues to defend its position, most recently to EPA. DE 35-1, pgs. 1-2 (letter from NDDH to EPA). EPA is still in the process of determining how to respond to this situation, but in the meantime, the mine continues its illegal construction. This is precisely the reason that citizens are allowed to enforce the Clean Air Act. In drafting the

Clean Air Act citizen suit provision, the U.S. Senate recognized that at times, governments may lack either resources or the political will to enforce the law. *Nat. Res. Def. Council, Inc. v. E.P.A.*, 484 F.2d 1331, 1337 (1st Cir. 1973); *see also* S. Rep. No. 91-1196, pp. 2-3 (1970). The Voigts are directly aggrieved by the mine's actions, and they therefore have a significant interest in ensuring that the law is upheld.

This background sets the context for discussing the questions asked by the Court. Both parties to this action agree that the basic question at issue in this case is relatively simple: what is the Potential to Emit PM from the mine's coal processing facility? This, of course, really consists of two sub-questions. First, what areas are encompassed by the mine's coal processing facility? Second, what does Potential to Emit mean (and relatedly, how does federal enforceability fit in)?

# **I. Areas encompassed within the mine's coal preparation and processing facility**

## **i. Background**

There are two separate and distinct Clean Air Act programs that apply to Coyote Creek Mine of relevance to this case. Sometimes they overlap, and sometimes they cross-reference each other. The New Source Performance Standards program comes from Section 111 of the Clean Air Act. This program requires EPA to designate Source Categories that will be subject to emission standards. Of relevance to this case, NSPS Subpart Y contains the new source performance standards applicable to "coal preparation and processing plants that process more than 181 megagrams (Mg) (200 tons) of coal per day." 40 C.F.R. § 60.250.

The PSD permitting program is a completely separate program under the Clean Air Act. This program requires major sources of air pollution to obtain a PSD permit on a pollutant by pollutant basis. 42 U.S.C. § 7475(a). There are two important pollutant quantity thresholds under the PSD program. The first is the major source threshold (for purposes of this case, 250 tons per



year of any air pollutant). *Id.* § 7479(1) (defining “major emitting facility”). The second are the significant emission rates listed at 40 C.F.R. 52.21(b)(23)(i) (e.g., 40 tons per year of NO<sub>x</sub>). If a facility exceeds the 250 ton per year threshold for any air pollutant, then it must obtain a PSD permit. Then, any pollutants for which the permittee will exceed the significant emission rates must comply with PSD requirements on a pollutant-by-pollutant basis as a prerequisite for obtaining the PSD permit, such as installing BACT controls to control that specific pollutant across the facility. Importantly, to determine whether a facility is a major source and to further determine whether a facility will emit in excess of the significant emission rates, the facility must determine its Potential to Emit.

The default rule under the PSD program is that facilities do not count fugitive emissions (i.e., those emissions not passing through a stack or vent) toward Potential to Emit. However, there are exceptions to this default rule. The most important exception, and the one applicable to this case, states that emissions from any “stationary source category” regulated by a New Source Performance Standard (i.e., under Section 111 of the Clean Air Act) that existed prior to August 7, 1980, must be included in a facility’s Potential to Emit calculation. 40 C.F.R. § 52.21(b)(1)(c)(iii)(aa). This is an explicit reference to the NSPS program, which is why it is necessary to understand the basics of that program for this case.

Both parties agree that because of this exception, all emissions, including fugitive emissions, from the mine’s coal preparation and processing facility must be counted toward the mine’s Potential to Emit because these types of facilities were regulated by a New Source Performance Standard prior to August 7, 1980. DE 8, Brief in Support of Defendant’s Motion to Dismiss, pg. 21 (“Thus, ‘fugitive emissions’ generated by operations at the coal preparation and processing plant located at the Coyote Creek Mine must be counted for purposes of determining

whether the Coyote Creek Mine is a Major Emitting Facility requiring a Major Source Permit to Construct. That is unremarkable.”). The question, therefore, is which facilities are included in the NSPS Source Category of “coal preparation and processing plants”?

The difference between an NSPS *Source Category* and an NSPS *Affected Facility* is crucial to this case and warrants repeating. EPA has created numerous NSPS Source Categories. Each Source Category is contained in its own Subpart of 40 C.F.R. Part 60 (e.g., NSPS Subpart Y). A Source Category is broad and encompasses *all* equipment and activities at the Source Category. For example, a few NSPS Source Categories include Portland Cement Plants, Hot Mix Asphalt Facilities, Primary Lead Smelters, Coal Preparation and Processing Plants processing more than 200 tons per day of coal, and so on. *See generally* 40 C.F.R. Part 60. Within each Source Category, EPA then defines the apparatuses and equipment at each Source Category that will be subject to emission standards. The apparatuses and equipment that are subject to emission standards are called “Affected Facilities.” 40 C.F.R. § 60.2 (defining “Affected Facility”). In other words, an Affected Facility is a discrete apparatus *at the Source Category* (such as a specific type of boiler at a power plant). Because only Affected Facilities are subject to emission standards under the NSPS program, there is often equipment at a Source Category that is not listed as an Affected Facility and is therefore not subject to any emission standards.

The distinction between a “Source Category” and an “Affected Facility” is important because EPA requires that all fugitive emissions from *all* equipment at the “stationary source category” (not just the equipment listed as Affected Facilities) be counted toward the permittee’s Potential to Emit. 40 C.F.R. § 52.21(b)(1)(c)(iii)(aa) (using phrase “stationary source category...under Section 111...of the Act”). In 2003, EPA drafted a guidance document containing an example illustrating this point directly in the context of NSPS Subpart Y:

Example: “A coal prep plant of the type covered by the NSPS in 40 CFR part 60, subpart Y. The coal prep plant falls within a listed source category as this source category was regulated by subpart Y as of August 7, 1980. The coal prep plant includes emissions units that are not regulated as “affected facilities” under the NSPS. You include fugitive emissions from all emission units at the coal prep plant to determine if the source is a major stationary source, including fugitive emissions from the units that are not regulated as “affected Facilities” under the NSPS.”

Exhibit B, EPA Guidance Memorandum from Cheryl L. Newton (EPA Acting Director of Air and Radiation Division) to Janet McCabe (Assistant Commissioner, Office of Air Quality, Indiana Department of Environmental Management), March 6, 2003, at pg. 6.

The Voigts’ argument, which is consistent with EPA’s plain regulatory language, is that the processing plant begins with the act of unloading coal onto the storage pile. Defendant has asserted that the only coal piles regulated by NSPS Subpart Y are those located after other processing equipment (even though they can cite to no regulation supporting their position), and therefore its open storage pile and unloading to this pile are exempt.

The Voigts’ interpretation is correct for three reasons. First, the plain language of EPA’s current, post-2009, NSPS Subpart Y states that this NSPS Source Category applies to open storage piles and unloading to these piles as Affected Facilities, without limitation. Second, even prior to 2009, EPA stated in its 1998 Guidance clearly and unequivocally that coal unloading to storage piles located before coal crushing and processing equipment is part of the NSPS Subpart Y Source Category. Therefore, the 2009 regulations merely built upon this prior guidance. And third, the only authority that Defendant relies upon to support its position is EPA’s response to comments in its 2009 rulemaking—the same rulemaking in which EPA explicitly designated open storage piles as Affected Facilities. That response to comments specifically cites to EPA’s 1998 guidance document in which EPA stated that coal piles were not Affected Facilities (they later became Affected Facilities in 2009) but that they were nonetheless part of the Source

Category. Defendant's authority is irrelevant, and the relevant portion of the document plainly supports Plaintiffs' position. Because EPA's longstanding guidance and more recent regulations are clear as a matter of plain language, Defendant is asking for nothing short of a complete re-write of the applicable regulations by this Court.

**a. EPA's 2009 NSPS Subpart Y regulations plainly support the Voigts' conclusion that this Source Category includes open storage piles and unloading to these piles, without limitation.**

Because the question of whether the open storage pile is included in Defendant's coal preparation and processing plant can be resolved as a matter of plain language, it is instructive to review how EPA organizes each NSPS. Every NSPS Subpart begins with the description of the Source Category (usually, as noted above, the description is broad). For example, NSPS Subpart Y begins with the statement: "The provisions of this subpart apply to Affected Facilities in coal preparation and processing plants that process more than 181 megagrams (Mg) (200 tons) of coal per day." 40 C.F.R. § 60.250. Immediately after the Source Category description, each NSPS Subpart always lists the Affected Facilities within that Source Category that will be subject to emission standards. For example, NSPS Subpart Y states that the emission standards in that subpart are "applicable to any of the following Affected Facilities that commenced construction, reconstruction or modification after May 27, 2009: Thermal dryers, pneumatic coal-cleaning equipment (air tables), coal processing and conveying equipment (including breakers and crushers), coal storage systems, transfer and loading systems, and open storage piles." 40 C.F.R. § 60.250(d). A definitions section then follows (40 C.F.R. § 60.251 for NSPS Subpart Y), followed by the detailed emission standards applicable to each Affected Facility (40 C.F.R. § 60.252 through 40 C.F.R. § 60.254 for NSPS Subpart Y) and monitoring and testing requirements (40 C.F.R. § 60.255 through 40 C.F.R. § 60.258 for NSPS Subpart Y).

40 C.F.R. § 60.250(d) lists “open storage piles” “that commenced construction, reconstruction or modification after May 27, 2009” as “affected facilities.” Affected Facilities, by their nature, are always part of their respective Source Categories. EPA could not have been more clear. There are no words of limitation used to limit the types of coal piles subject to regulation under this rule. 40 C.F.R. § 60.251(m) defines “open storage piles” as “any facility, including storage area, that is not enclosed that is used to store coal, including the equipment used in the loading, unloading, and conveying operations of the facility.” Two points are notable in this definition. First, the definition expressly uses the words “any facility.” This is the opposite of the interpretation advanced by Defendant (*i.e.*, that EPA only intended to regulate open storage coal piles located after coal crushing plants). Second, the definition explicitly includes “equipment used in the loading, unloading, and conveying operations” of the pile. At Defendant’s mine, coal will be unloaded directly onto the pile for temporary storage, and then bulldozers will load and convey that coal directly into the next part of the coal preparation and processing facility, which is the crushing apparatus. The definition in EPA’s rule precisely matches what Coyote Creek Mine plans to do at its facility.

This Court asked whether an open coal pile located a mile from the rest of the coal processing facility would be considered part of the coal processing facility. Such a coal pile would indeed be part of the coal preparation and processing plant *if* this is where raw coal is unloaded for later processing, such as crushing. Based on the language of NSPS Subpart Y and the use of the word “unloading” in the definition of “open storage pile,” the coal processing facility includes the point where raw coal is unloaded. 40 C.F.R. § 60.251(m). Nonetheless, because Defendant’s coal pile will be physically touching the rest of the coal preparation and processing plant and EPA has spoken to the exact setup at Defendant’s mine in its 1998

Guidance, described *infra*, such a question is not at issue here. DE 21-1, Diagram of Coyote Creek Mine's Coal Processing Facility (depicting its coal pile as physically touching other portions of its coal preparation and processing plant).

**b. EPA's pre-2009 guidance document plainly states that the NSPS Subpart Y Source Category includes coal piles located prior to other processing equipment, as well as unloading to those piles.**

EPA's 2009 rule simply built upon its preexisting guidance. In 1998, EPA in no uncertain terms explained that while coal unloading was not an Affected Facility under NSPS Subpart Y (it became an Affected Facility pursuant to EPA's 2009 rulemaking), unloading to temporary storage coal piles was nonetheless part of the NSPS Subpart Y Source Category. EPA continued on to say that, therefore, fugitive emissions from these facilities and activities must be counted to determine major source status.

"EPA has determined by rule that fugitive emissions count towards the major source threshold for all sources that belong to the Source Category regulated by NSPS Subpart Y...all coal unloading at a coal preparation plant is part of the source belonging to the Source Category for coal preparation plants...Coal unloading of all types also fits within the NSPS Source Category...Common sense would dictate that coal unloading for temporary storage be treated no differently. It is performed at the same facility and is an integral part of the operations of that facility. The latter type of coal unloading is simply an optional first step in the coal preparation process."

Exhibit C, Environmental Protection Agency, Nov. 16, 1998, National Guidance on Interpretation of the New Source Performance Standards- Subpart Y (Standards of Performance for Coal Preparation Plants), pg. vi (emphasis added) (hereafter "1998 Guidance").

The 1998 Guidance provides the answer to the question disputed between the parties to this case. It plainly states that coal unloading for *temporary* storage, even when it is an "optional first step in the coal preparation process," is part of the coal preparation and processing facility. EPA further stated that coal unloading for temporary storage is an "integral" part of the coal

processing and preparation process. *Id.* Coyote Creek Mine’s argument that only those storage piles located after the crushing facility are part of the Coal Preparation and Processing Facility is in direct conflict with EPA’s statement that coal unloading is “an optional first step in the coal preparation process.” *Id.* This portion of EPA’s guidance is perfectly valid today. The breadth of the Source Category, which is what the 1998 Guidance is interpreting, has remained the same since it was promulgated in 1974. Further, because this guidance is EPA’s interpretation of its own regulation, it is entitled to substantial deference under *Auer v. Robbins*. 519 U.S. 452, 461 (1997).

There is no question that under EPA’s own longstanding interpretation of NSPS Subpart Y, all coal piles holding raw coal for later crushing and unloading to such coal piles are part of the coal preparation and processing plant. As applied to Defendant’s coal pile, EPA’s view also matches with common sense: Coyote Creek Mine’s coal pile is so integral to the rest of its coal preparation and processing facility that it will be *physically touching the rest of the plant*. DE 21-1, Diagram of Coyote Creek Mine’s Coal Processing Facility (depicting its coal pile as physically touching other portions of its coal preparation and processing plant).

**c. Defendant cites to an irrelevant portion of the 1998 Guidance to support its position, and the relevant portion of that same document plainly supports the Voigts’ interpretation.**

Defendant vigorously claims that its open storage coal pile is not part of its coal processing plant because it is located prior to its coal crushing equipment, but the only alleged authority pointed to by Defendant actually supports Plaintiffs’ position. Specifically, Defendant has cited to EPA’s response to comments in its 2009 rulemaking, in which EPA stated that in “1998, EPA Headquarters published an interpretative ruling...stating that...if the coal is unloaded for the purpose of storage, then the unloading activity is not an affected facility under

Subpart Y. The coal must be directly unloaded into receiving equipment, such as a hopper, to be subject to the provisions of Subpart Y.” DE 21-2, EPA Response to Comments, pg. 13; DE 8, Defendant’s Brief in Support of Motion to Dismiss, pgs. 21-22. The “interpretive ruling” that EPA was referencing is the 1998 Guidance discussed above. In that Guidance document, EPA definitively stated that even though coal unloading to open storage piles was not an Affected Facility at that time, those activities were nonetheless part of the NSPS Subpart Y Source Category. Moreover, the only reason that EPA was soliciting comments on this issue is because the 2009 rulemaking explicitly designated open storage piles as Affected Facilities. Coal piles were not an Affected Facility prior to 2009, but were nonetheless part of the Source Category. 1998 Guidance, pg. vi. Defendant’s sole authority for its position is therefore irrelevant.

**d. Coyote Creek’s interpretation of NSPS Subpart Y amounts to nothing short of a request for judicial construction of a clear EPA rule.**

The Supreme Court has stated “[i]t is elementary that the meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain... the sole function of the courts is to enforce it according to its terms.” *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917). “Where the language is plain and admits of no more than one meaning, the duty of interpretation does not arise, and the rules which are to aid doubtful meanings need no discussion.” *Id.* The same rule also applies to interpretation of regulations. *See e.g., Auer v. Robins*, 519 U.S. 452, 461 (1997) (upholding Secretary of Labor’s interpretation of his own regulations based primarily on dictionary definitions); *Christenson v. Harris Cnty.*, 29 U.S. 576, 586-88 (2000) (rejecting agency’s construction of its own regulation based upon plain meaning analysis).

Here, Defendant is asking for nothing less than for this Court to completely re-write EPA’s clear regulation defining “open storage pile.” 40 C.F.R. § 60.251(m) defines “open



storage pile” as “any facility, including storage area, that is not enclosed that is used to store coal, including the equipment used in the loading, unloading, and conveying operations of the facility.” Defendant is asking for the Court to re-write this regulation to mean something more like “open storage pile means any facility located after coal processing and conveying equipment, including storage area, that is not enclosed that is used to store coal, including the equipment used in the loading, unloading, and conveying operations of the facility.” The regulation does not say this. Such an interpretation is unreasonable and, if accepted, would amount to impermissible judicial construction.

Because the coal processing facility includes the mine’s open storage coal pile, unloading to this pile, and activities upon the pile, PM emissions from each of these activities and locations must be counted toward the mine’s Potential to Emit. 40 C.F.R. § 52.21(b)(1)(c)(iii)(aa).

## **II. Potential to Emit**

### **i. Background**

In addition to counting emissions from the coal pile, Defendant also must count the full, uncontrolled, emissions from its coal crushing facility (*i.e.* its primary crusher, secondary crusher, and associated conveyor belts and transfer points) in its calculation of Potential to Emit. This is in spite of the fact that Defendant plans to have a Passive Enclosure Containment System over this equipment. The reason, as previously alluded to, is simple: Coyote Creek Mine has not determined how effective its air pollution control equipment will be and simply stated that emissions from its coal crushing facility would be “negligible and unquantifiable” while providing no actual supporting data for this assertion. DE 1-2, pg. 10. Based on this lack of information, there is no conceivable way for NDDH, EPA, the public, or the mine to know whether Coyote Creek Mine’s emissions will be below major source levels.

Moreover, Defendant's statement that its emissions will be "negligible and unquantifiable" does not match its own industry's statistics or EPA data. In data submitted by the National Mining Association to EPA, the Association explained that emissions from six fully enclosed crushing facilities each emitted at a maximum of 5-15% opacity at either the feed-in location or coal discharge point. NMA Comments, July 13, 2009, at Table A-02, *available at* [http://www.nma.org/pdf/misc/071609\\_nma\\_comments.pdf](http://www.nma.org/pdf/misc/071609_nma_comments.pdf). It is common sense that emissions that are visible (i.e., 5-15% opaque) are not "negligible." Further, as part of the 2009 NSPS Subpart Y rulemaking process, EPA reviewed data from six model coal processing facilities. DE 38-4, Environmental Protection Agency, Model Plant Control Costing Estimates for Units Subject to the NSPS for Coal Preparation Plants (April, 2008). Unfortunately, none of these facilities were lignite mines and none were from North Dakota. Three of the six facilities (A, B, and C) were also much smaller than Coyote Creek Mine's coal processing facility (30 tons per hour compared to an average 365 tons per hour for Coyote Creek Mine). *Id.* at 16. However, the information from the remaining three facilities, and especially Facility F, is nonetheless instructive. Not only was EPA readily able to quantify expected emissions from every one of these facilities, but it determined that *controlled* emissions from Facility F, when using an enclosure similar to that planned at Coyote Creek Mine, was 324 tons per year for a 2,000 ton/hour facility using an enclosure without a baghouse. *Id.* Coyote Creek Mine's coal crushing equipment is rated at exactly 2,000 tons/hr and will use an enclosure with no baghouse. DE 1-2, Minor Source Permit to Construct, pg. 2 (describing Coyote Creek Mine's coal processing equipment as having "rated capacity of 2,000 tons/hr"). Uncontrolled emissions would be significantly higher. This information all but confirms that emissions from Coyote Creek Mine's coal crushing facility are neither "negligible" nor "unquantifiable."

The lack of any such information from Coyote Creek Mine results in a situation where any limitation on emissions to ensure that the mine's emissions are below major source levels is, by definition, not "federally enforceable" as required by 40 C.F.R. § 52.21(b)(4). Here, though, Coyote Creek Mine went a step further than this. It simply left the Potential to Emit portion of its application for its air permit blank, did not ask for a federally enforceable limit on its emissions to avoid PSD permitting, and therefore holds no such limit at all. DE 1-1, Application for Minor Source Permit to Construct, pg. 14. Although the topic of "federal enforceability" and "Potential to Emit" is admittedly a dry one, this is a serious matter. EPA's own guidance, further described *infra*, states that "[e]very source which is subject to these requirements [*i.e.*, those failing to properly limit emissions below major source levels] but has not obtained a major new source permit should be seriously considered for enforcement action." Exhibit D, Environmental Protection Agency, June 13, 1989, Guidance on Limiting Potential to Emit in New Source Permitting, (hereafter "1989 Guidance").

## **ii. The definition of Potential to Emit**

The starting point for defining Potential to Emit is the Clean Air Act itself. 42 U.S.C. § 7479(1) defines "major emitting facilit[ies]" as "any of the following stationary sources of air pollutants which emit, or have the Potential to Emit, one hundred tons per year or more of any air pollutant ..." and that "[s]uch term also includes any other source with the Potential to Emit two hundred and fifty tons per year or more of any air pollutant." While the statute itself provides no further definition of Potential to Emit, the statute does clearly differentiate the term from emissions that actually occur ("emit, or have the Potential to Emit..."). Therefore, the phrase Potential to Emit does not mean *actual* emissions. EPA has further defined the term Potential to Emit in its regulations. Under 40 C.F.R. § 52.21(b)(4),

Potential to Emit means the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of material combusted, stored, or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable. Secondary emissions do not count in determining the Potential to Emit of a stationary source.

The wording of this definition allows a facility to reduce its Potential to Emit *if* (and only if) there is a “physical” (such as air pollution control equipment) or “operational” (such as “restriction on hours of operation”) “limitation on the capacity of the source to emit a pollutant” that is “federally enforceable.”

Any facility that would normally emit at major source levels but uses emission control equipment to limit its emissions below the major source threshold can obtain a special permit in order to avoid the more stringent PSD permitting requirements. This is commonly called a Synthetic Minor permit to construct. As required by EPA’s definition of Potential to Emit, 40 C.F.R. § 52.21(b)(4), such a permit has a federally enforceable limit on the facility’s Potential to Emit (e.g., a requirement to use emission control equipment of a specified efficiency, limiting hours of operation, etc.) and associated monitoring and recordkeeping (e.g., emission monitoring equipment to ensure that the controls are working, daily records of hours of operation, etc.), to ensure that the facility’s emissions do in fact stay below major source levels. As will be explained *infra*, in order to obtain such a permit, the facility must prove in advance that its emissions will be below major source levels and then must continue to monitor and verify that its actual emissions remain below major source levels. Otherwise, the permittee must obtain a PSD permit.

Potential to Emit is always measured by weight (usually in tons). This is because, as noted previously, a major stationary source is any facility “with the Potential to Emit two

hundred and fifty tons per year or more of any air pollutant.” 42 U.S.C. § 7479(1) (emphasis added).

Defendant essentially argues that because it plans to use a Passive Enclosure Containment System (“PECS”) to comply with a federal opacity limit on its primary and secondary crushers, that it therefore has a federally enforceable limit on Potential to Emit PM from its crushing facilities. Defendant is wrong for three reasons. First, the federal opacity limit applicable to its coal crushing facility does not limit *total* emissions—it just limits the opacity of the crushing facility’s air emissions, which is a completely different issue. Second, Defendant has provided no information regarding the effectiveness of its emission controls, which violates EPA’s federal enforceability requirement. 40 C.F.R. § 52.51(b)(4) (requiring that Potential to Emit limits based on physical/operational be “federally enforceable”); Julie R. Domike & Alec C. Zacaroli, *THE CLEAN AIR ACT HANDBOOK*, pg. 196 (3<sup>rd</sup> Ed., 2011) (explaining that based on EPA’s most recent 2002 rule revisions, federally enforceable limits on Potential to Emit, at minimum, require an emission limitation below major source levels that is “legally enforceable and practicably enforceable”). And third, Defendant has no plans to monitor and is not required under its minor source permit to monitor whether it will in fact remain under the 250 ton per year limit, which also violates the federal enforceability requirement. 40 C.F.R. § 52.51(b)(4); Julie R. Domike & Alec C. Zacaroli, *THE CLEAN AIR ACT HANDBOOK*, pg. 196 (3<sup>rd</sup> Ed., 2011).

The definition of Potential to Emit at 40 C.F.R. § 52.21(b)(4) plainly states that a permittee may only base its Potential to Emit off of its controlled emission rates if such rates are federally enforceable. Here, they are not. Therefore, the mine is required by law to count its “maximum capacity...to emit,” without taking into account “air pollution control equipment,” to determine its Potential to Emit.

**a. NSPS Subpart Y's 10% opacity requirement for the coal crushing facility does not limit total quantity of emissions.**

Defendant has previously argued that because its coal crushing facility is subject to a federally enforceable 10% opacity requirement at 40 C.F.R. § 60.254(b)(1) that it therefore also has a federally enforceable limit on its Potential to Emit. Defendant is conflating two completely different Clean Air Act requirements. The Voigts fully agree with Defendant that if it emits at greater than 10% opacity from its coal crushing facility, that it would be in violation of NSPS Subpart Y, a federal law that is federally enforceable. But even if Defendant complies with this opacity requirement, this does not serve as a bar on total *quantity* of emissions. Defendant could emit 1,000 tons per year of PM at 5% opacity and comply with this performance standard, but it would still be a major source illegally constructing without a major source permit. This is because the opacity requirement has nothing to do with limiting *total* emissions.

**b. Because Defendant has not determined the effectiveness of its emissions control system and holds no permit enforceably limiting its emissions to less than 250 tons per year, Defendant is required by law to count its uncontrolled emissions toward Potential to Emit.**

The hallmark of a proper limit on Potential to Emit is federal enforceability, which is contained in EPA's definition of Potential to Emit. "Federally enforceable" is defined by regulation as "all limitations and conditions which are enforceable by the Administrator." 40 C.F.R. 52.21(b)(17). As will be explained *infra*, today, the term "federally enforceable" in fact means all limitations and conditions which are enforceable by "some authority," including the state implementing the Clean Air Act or the EPA Administrator. 67 Fed. Reg. 80,190-91 (2002)

The Voigts have already discussed at length EPA's 1989 Guidance in DE 27, pgs. 5-9. However, the main points of that document are worth paraphrasing because this document remains the seminal document on federally enforceable limits on Potential to Emit. In order for a

limit on Potential to Emit to be federally enforceable, it must be enforceable in practice. *U.S. v. Louisiana-Pacific Corp.*, 682 F. Supp. 1122 (D. Colo. Oct. 30, 1987); 682 F. Supp. 1141 (D. Colo. March 22, 1988). Thus, in order to legally limit Potential to Emit below major source levels, the permittee must first prove how and why its emissions will be below major source levels. 1989 Guidance, pg. 7 (“When permits require add-on controls operated at a specified efficiency level, permit writers should include, so that the operating efficiency condition is enforceable as a practical matter, those operating parameters and assumptions which the permitting agency depended upon to determine that the control equipment would have a given efficiency”). Then, and only then, the permitting agency may grant the permittee a federally enforceable limit on its emissions contained in a Synthetic Minor Permit that allows the permittee to avoid PSD permitting rules (*e.g.*, allowing production causing emissions of 20 tons per month of PM, which would yield 240 tons per year of PM and thus avoid PSD permitting). EPA goes on to say that such federally enforceable limits must be written on the basis of a monthly period of emissions or shorter. *Id.* pg. 9. Finally, EPA then states that in order for such a limit to be enforceable in practice, such a permit must also require sufficient monitoring and recordkeeping to ensure that the emission limit is actually met by the permittee. *Id.*, pg. 6 (“When permits contain production or operational limits, they should also have recordkeeping requirements that allow a permitting agency to verify a source's compliance with its limits. For example, permits with limits on hours of operation or amount of final product should require an operating log to be kept in which the hours of operation and the amount of final product produced are recorded”).

In 1995, the EPA requirement of federal enforceability was overturned for purposes of calculating Potential to Emit under the PSD program in 1995 in *Chemical Manufacturers v. EPA*,

70 F.3d 637, where the U.S. Court of Appeals for the District of Columbia Circuit, without an opinion, vacated the requirement that Potential to Emit limits be “federally enforceable” and remanded the rule to EPA for justification of the requirement. In the 2002 PSD Rule revisions, EPA retained the requirement of federal enforceability and provided further explanation, as requested, stating that

“[a] requirement is ‘legally enforceable’ if some authority [in other words, state or federal government] has the right to enforce the restriction. Practical enforceability for a source-specific permit will be achieved if the permit’s provisions specify: (1) A technically-accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation (hourly, daily, monthly, and annual limits such as rolling annual limits); and (3) the method to determine compliance, including appropriate monitoring, recordkeeping, and reporting.”

67 Fed. Reg. 80,190-91 (2002). The 2002 PSD Rule revisions are still good law, and this interpretation, contained in the preamble of the rule, is EPA’s interpretation of its own regulation defining “federally enforceable,” 40 C.F.R. § 52.21(b)(4,17), and is therefore entitled to substantial deference. *Auer v. Robbins*. 519 U.S. 452, 461 (1997). It also very closely tracks the reasoning in EPA’s 1989 guidance. The only difference between the reasoning in the 1989 Guidance and the 2002 PSD rule revision is that, in 2002, EPA acknowledged that a requirement could be federally enforceable so long as “some authority,” including state government, has the “right to enforce the provision.” 67 Fed. Reg. 80,190-91 (2002). The remainder of the reasoning is the same. The 1989 Guidance is still EPA’s definitive document on the requirement of federal enforceability.

As applied to Coyote Creek Mine, there is no “technically-accurate limitation” applicable to this mine in its minor source permit that is enforceable by *any* authority. 67 Fed. Reg. 80,190-91 (2002). This is because Defendant did not go so far as to request a federally enforceable limit on its emissions. Nor did it comply with the pertinent law by determining the effectiveness of its



emission controls. It also did not ask for monitoring, and its current minor source permit has no monitoring requirements to ensure that emissions are kept below major source levels. DE 1-2, Minor Source Permit to Construct, pg. 5 (containing very basic recordkeeping requirements that do not include any monitoring requirements to ensure that emissions are kept below a specified rate). In other words, not only does Coyote Creek Mine not hold a PSD permit, but it also does not hold a permit of any type that enforceably limits its emissions below major source levels.

EPA's 1989 Guidance provides examples of permit limits that properly meet the requirement of federal enforceability, and those that do not. 1989 Guidance, pgs. 18-21. Notably, EPA did not see the need to provide an example where a permit applicant did not bother to ask for a federally enforceable limit on its Potential to Emit, presumably because that is such a clear violation of the law that EPA felt it was not necessary. And yet, that is precisely the situation presented in this case. What is even more striking is that the Department of Health nonetheless approved of this, and did so without any notice to the public. Because Coyote Creek Mine has not determined the effectiveness of its emission controls, does not hold a federally enforceable limit on emissions from its coal crushing facility, and is not required to monitor to ensure that its emissions will be below major source levels, it does not hold a "federally enforceable" limit on its Potential to Emit. 40 C.F.R. § 52.21(b)(4). EPA's rules require that if a facility cannot demonstrate its ability to emit at levels below major source levels or if an emission limit intended to limit emissions below major source levels is not federally enforceable, then the uncontrolled emissions must be used to determine Potential to emit. *Id.* This is precisely the method used in Plaintiffs' complaint for equipment at Defendant's coal crushing facility.

### III. Abstention

As shown herein, this case is based solely on federal law. It will have no impact on any state program. Even though North Dakota has chosen to run its own Clean Air Act permitting program, the PSD permit at issue here would be required whether or not NDDH implemented the Clean Air Act in North Dakota. In other words, if NDDH did not implement the Clean Air Act in our state, the Clean Air Act would require EPA to do so. 42 U.S.C. § 7410(c). Further, Plaintiffs had no opportunity to participate in the state's administrative process underlying the minor source permit to construct, and there is no clear cause of action or means to fix the serious problems described in this case at the state level. There are numerous reasons that abstention would be improper in this case. In fact, Defendant's leading case on abstention, *NRDC v. BP Prods. N. Am., Inc.*, No. 2:08-CV-204, 2009 U.S. Dist. LEXIS 54363 (N.D. Ind. June 26, 2009), supports *not* abstaining. In that case, counsel for Plaintiff was representing allied parties simultaneously in ongoing state administrative proceedings and in federal court, and counsel used the same briefs in both forums, word for word. The court abstained, recognizing the risk of duplicative litigation and potentially conflicting outcomes, but explicitly recognized that it could still hear the case in the future. That court simply wanted to allow the state process to come to its conclusion. In the instant case, the state process has come to a close. There is nothing more that can be done at the state level, and the state has made its final decision to not issue the permit required by federal law. Finally, the Voigts' claims are based on federal statutes and regulations, and brought pursuant to a federal citizen suit provision in federal court. It would be contrary to the intent of Congress to abstain under these circumstances.

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendant's motion to dismiss, grant Plaintiffs' motion to amend their complaint, and allow this case to move to discovery.

Dated this 8<sup>th</sup> day of March, 2016

**BAUMSTARK BRAATEN LAW PARTNERS**

/s/ Derrick Braaten

Derrick Braaten (ND Bar # 06394)

JJ England (ND Bar # 08135)

*Attorneys for Plaintiffs*

109 North 4<sup>th</sup> Street, Suite 100

Bismarck, ND 58501

Phone: 701-221-2911

Fax: 701-221-5842

derrick@baumstarkbraaten.com

jj@baumstarkbraaten.com

**CERTIFICATE OF SERVICE**

I hereby certify that on March 8, 2016, the foregoing was served electronically upon all parties who have appeared in the docket via CM/ECF.

/s/ JJ England

JJ England

**IN THE UNITED STATES DISTRICT COURT  
DISTRICT OF NORTH DAKOTA  
SOUTHWESTERN DIVISION**

Casey Voigt and Julie Voigt,	)	Civil No. 1:15-CV-00109
	)	
Plaintiffs,	)	
vs.	)	
	)	
Coyote Creek Mining Company, L.L.C., a	)	<b>AFFIDAVIT OF JULIE VOIGT</b>
North Dakota Corporation,	)	
	)	
Defendant.	)	

---

STATE OF NORTH DAKOTA     )  
  )ss.  
COUNTY OF BURLEIGH     )

Julie Voigt, being duly sworn, states under oath as follows:

1. I am a Plaintiff in the above-captioned matter. I am over 21 years of age and have personal knowledge of the statements contained in this Declaration and if called to testify, would testify thereto under oath.
2. Attached to this affidavit are still frames marked as Photos 1-14 taken from a video that I took of Coyote Creek Mine's haul road and haul trucks between 4:00 PM and 5:00 PM on February 23, 2016. I took the video with a Sony Handycam HDR-CX240 video camera. At the time that I took this video, I was sitting in my vehicle, with the window down, on County Road 12 above Coyote Creek's primary north/south haul road.
3. I took Photos 1-11 through while facing south toward my property. My cattle are in photo 5 on the left side of the road (to the east of the road).

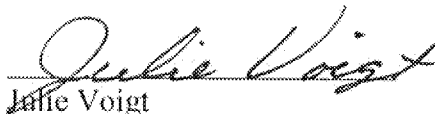
**EXHIBIT A TO PLAINTIFFS' SUPPLEMENTAL BRIEF**

4. I took the photos attached hereto and described as Photos 12-14 while facing north from the same location (County Road 12 above Coyote Creek Mine's haul road).

5. I did not manipulate this video or the frames taken from it and attached hereto in any way.

6. I would describe the dust depicted in these videos as blinding. Based on my personal observations of the dust depicted in these still frames, I witnessed Coyote Creek Mine's haul trucks create significant quantities of dust that formed a cloud directly over my cattle. I estimate that this dust traveled for over a half a mile.

Dated this 7 day of March, 2016.

  
Julie Voigt

STATE OF NORTH DAKOTA     )  
  )ss.  
COUNTY OF BURLEIGH     )

On this 7th day of March, 2016, before me personally appeared Julie Voigt, known to me to be the same person who is described in and who executed the within document, and acknowledged to me that he executed the same.

  
Notary Public  
State of North Dakota

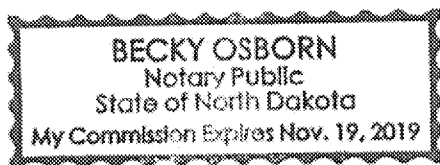




PHOTO 1

EXHIBIT A TO PLAINTIFFS' SUPPLEMENTAL BRIEF



PHOTO 2

EXHIBIT A TO PLAINTIFFS' SUPPLEMENTAL BRIEF



EXHIBIT A TO PLAINTIFFS' SUPPLEMENTAL BRIEF





PHOTO 4

EXHIBIT A TO PLAINTIFFS' SUPPLEMENTAL BRIEF



PHOTO 5

EXHIBIT A TO PLAINTIFFS' SUPPLEMENTAL BRIEF



EXHIBIT A TO PLAINTIFFS' SUPPLEMENTAL BRIEF



EXHIBIT A TO PLAINTIFFS' SUPPLEMENTAL BRIEF

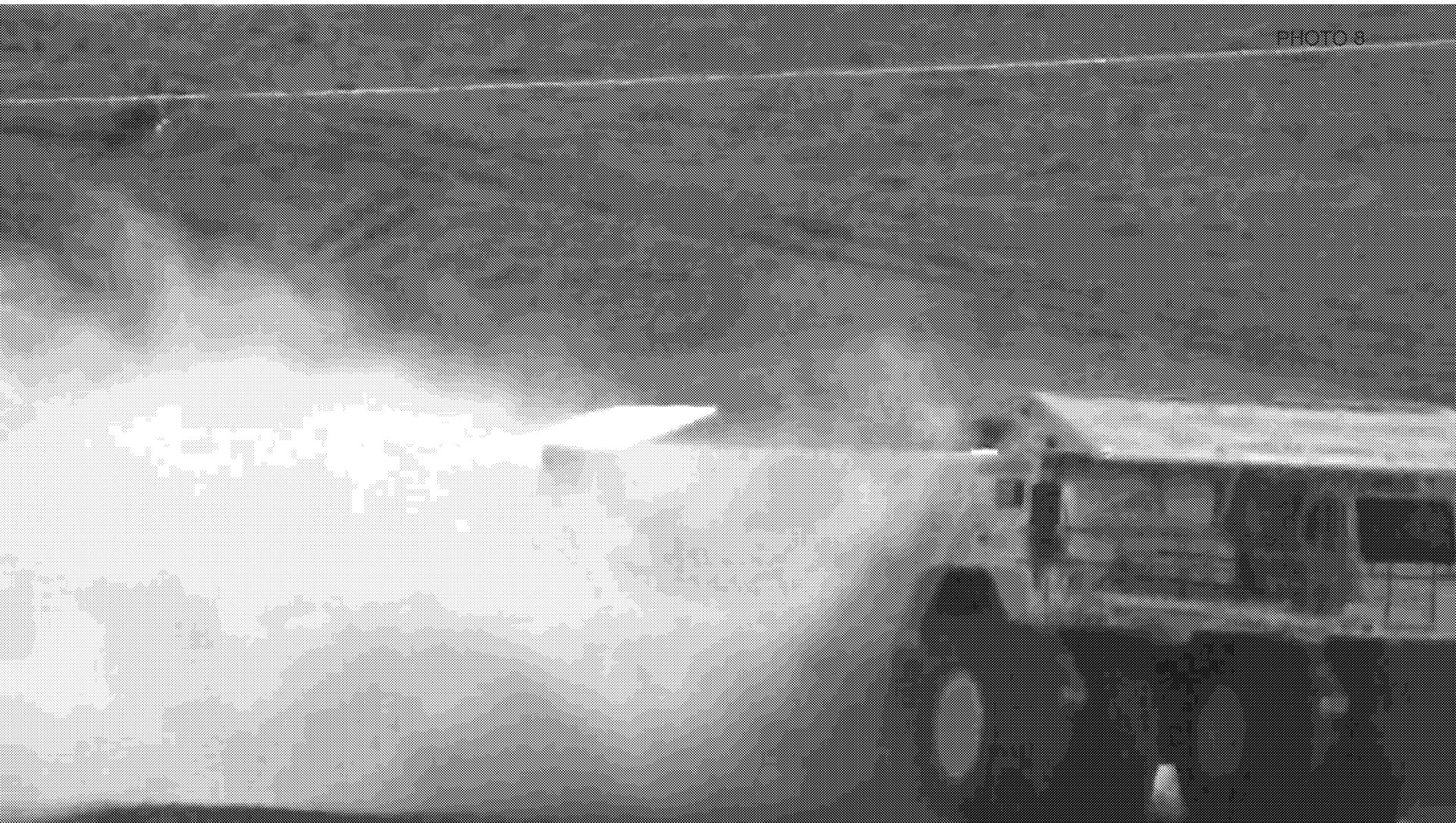


EXHIBIT A TO PLAINTIFFS' SUPPLEMENTAL BRIEF



PHOTO 9

EXHIBIT A TO PLAINTIFFS' SUPPLEMENTAL BRIEF





PHOTO 10

EXHIBIT A TO PLAINTIFFS' SUPPLEMENTAL BRIEF



EXHIBIT A TO PLAINTIFFS' SUPPLEMENTAL BRIEF





PHOTO 12

EXHIBIT A TO PLAINTIFFS' SUPPLEMENTAL BRIEF



EXHIBIT A TO PLAINTIFFS' SUPPLEMENTAL BRIEF



PHOTO 14

EXHIBIT A TO PLAINTIFFS' SUPPLEMENTAL BRIEF

March 6, 2003

(A-18J)

Janet McCabe, Assistant Commissioner  
Office of Air Quality  
Indiana Department of Environmental Management  
100 North Senate Avenue  
P.O. Box 6015  
Indianapolis, Indiana 46206-6015

Dear Ms. McCabe:

In discussions with United States Environmental Protection Agency (EPA) Region 5, State permitting authorities have requested clarification on our fugitive emissions policy. Specifically, the States have asked EPA to clarify to what extent, and from which emission units, are fugitive emissions counted towards major source applicability for Title V, nonattainment new source review (NSR), and prevention of significant deterioration (PSD). Various EPA letters and memoranda provide guidance on when you count fugitive emissions to determine whether a source is a major stationary source subject to Title V, NSR, or PSD, but there is no one guidance document which addresses the various scenarios which arise.

In the enclosed analysis, we are providing some examples that should help you understand when to include fugitive emissions in determining whether a source is major for purposes of Title V, NSR, or PSD. However, no part of this document, including the following examples, create any new legally binding obligations. Rather, the purpose of this document is to help you understand the statutory provisions and regulations which govern when fugitive emissions are included in major source determinations and EPA's interpretation of these provisions and regulations.

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This response has been coordinated with staff in EPA's Office of Air Quality Planning and Standards, Office of Enforcement and Compliance Assurance, and Office of General Counsel in order to help assure completeness and accuracy.

If you have any questions regarding this letter, please contact Sam Portanova, of my staff, at (312) 886-3189.

Sincerely yours,

/s/ (Stephen Rothblatt for)

Cheryl L. Newton, Acting Director  
Air and Radiation Division

Enclosure

## ANALYSIS

### What Effect Did the November 27, 2001, Title V Rulemaking Have on the Counting of Fugitive Emissions?

On November 27, 2001 (66 FR 59161), EPA published a rule, "Change to Definition of Major Source," that requires or clarifies the following for Title V:

- An owner or operator of a source must include the fugitive emissions of all pollutants regulated under the Clean Air Act in determining whether the source is a major stationary source under Title V if the source falls within one of the source categories listed through a rulemaking pursuant to section 302(j) of the Act ("listed source categories").<sup>1</sup> Included as listed source categories are source categories regulated by a section 111 or 112 standard on or before August 7, 1980.
- An owner or operator of a source that falls within a listed source category that was regulated by a section 111 or 112 standard on or before August 7, 1980, must include the fugitive emissions of all air pollutants regulated under the Act, not just those pollutants regulated by the section 111 or 112 standard, in determining whether the source is a major stationary source under Title V.
- An owner or operator of a source must include the fugitive emissions of all hazardous air pollutants ("HAPs") listed under section 112(b) of the Act in determining whether the source is a major source for purposes of section 112 and Title V, regardless of whether the source falls within a listed source category. See National Mining Ass'n v. EPA, 59 F.3d 1351 (D.C. Cir. 1995).

### What Are Some Examples of When You Count Fugitive Emissions to Determine Whether Your Source is Major?

Below are several scenarios that illustrate how to consider fugitive emissions in determining whether a source is a major stationary source.<sup>2</sup> You should note that the examples below rely

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<sup>1</sup> For the purposes of this document, "listed source categories" refer to the source categories identified in 40 CFR §§ 51.165(a)(1)(iv)(C), 51.166(b)(1)(iii), 52.21(b)(1)(iii), 52.24(f)(4)(iii), and the second definition of "major source" in 40 CFR 70.2 and 71.2.

<sup>2</sup> Consistent with a voluntary remand in a case regarding the question of when is a source of fugitive emissions major for purposes of Title V, EPA has rescinded its interpretation of what the collocation language of 40 CFR part 70 requires with respect to unlisted sources of fugitive emissions. As explained in a memorandum from

- 2 -

on certain assumptions regarding the complex industrial facilities described. The question of what is the primary activity at such a source or what emission units are properly considered to be a part of the source can be difficult to answer in any given case. The assumptions underlying these examples are not intended to shortcut the very fact intensive inquiry that such questions may require.

#### *Scenarios*

The first 3 scenarios below apply to the counting of fugitive emissions of regulated pollutants. The last scenario applies to the counting of fugitive emissions of any HAP listed under section 112(b) of the Act.

1. A stationary source in a listed source category. If the primary activity of a stationary source falls within a listed source category, then fugitive emissions are included from all emissions units at the source. The stationary source encompasses not only all emission units within the same SIC code at the facility, but also emission units at support facilities that are part of the source.

#### *Examples:*

- A petroleum refinery. Petroleum refineries are a listed source category. You include fugitive emissions from the refinery to determine whether it is a major stationary source.
- A steel mill with an onsite slag handling operation. The primary activity of the source, in this case, is the production of steel, and steel mills are a listed source category. Although slag handling is not a listed source category, the onsite slag handling operation here is a support facility for the steel mill. You include fugitive emissions from the steel mill (a listed source category and the primary activity at this source) as well as the fugitive emissions from the slag handling operation (an unlisted source category, but one which supports the primary activity here) to determine if the source is a major stationary

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EPA, States have discretion in interpreting what the part 70 rule's collocation language requires with respect to unlisted sources of fugitive emissions. Memorandum from Lydia Wegman to Regional Air Director (June 2, 1995) (<http://www.epa.gov/Region7/programs/artd/air/title5/t5memo5/añcguiidē.pdf>). Please refer to this memorandum for an explanation of the scope of the voluntary remand. As a result of this voluntary remand, the first two scenarios discussed below may, or may not, be applicable to the implementation of part 70 in your State, depending on your State's exercise of its discretion.

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source.

- A fossil-fuel-fired steam electric plant of more than 250 million BTUs per hour heat input located a short distance away from a coal mine that supplies all of its coal to the steam electric plant. The primary activity of the source, in this case, is the generation of steam and electricity, and steam electric plants as described above are a listed source category. You include fugitive emissions from the steam electric plant (a listed source category and the primary activity at this source) as well as the fugitive emissions from the coal mine (an unlisted source category and the support facility at this source) to determine if the source is a major stationary source.

2. A stationary source in an unlisted source category. If the primary activity of a stationary source falls within a source category that is not listed, then as a general matter fugitive emissions from the emissions units at the source are not included in determining whether the source is a major stationary source. However, if the source also contains emission units which do fall within a listed source category (or categories), then you include fugitive emissions from these listed emissions units to determine if the source is a major stationary source.

Examples:

- A food processing plant that has several petroleum liquid storage tanks subject to the NSPS in 40 CFR part 60, subpart Ka. The primary activity of the source, in this case, is the processing of food, and food processing plants are not a listed source category. The storage tanks, however, fall within a listed source category as this source category was regulated by subpart Ka as of August 7, 1980. You include fugitive emissions only from the storage tanks to determine if the source is a major stationary source.
- A coal mine with an onsite coal cleaning plant with a thermal dryer. The primary activity of the source, in this example, is the mining of coal, and coal mines are not a listed source category. The coal cleaning plant, however, does fall within a listed source category. You include fugitive emissions only from the coal cleaning plant to determine if the source is a major stationary source.

3. A stationary source in one of the source categories regulated by a section 111 new source performance standard (NSPS) on or



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before August 7, 1980, that contains emissions units that are grandfathered from the NSPS requirements (e.g., constructed before the applicability date of the NSPS) or that are not regulated as "affected facilities" under the NSPS. You include fugitive emissions from all emission units at the source to determine if it is a major stationary source because the source falls within a listed source category. The decision to include fugitive emissions from a stationary source is not influenced by whether specific emissions units are subject to regulation.

Examples:

- A grain elevator of the type covered by the NSPS in 40 CFR part 60, subpart DD, but which is grandfathered from the requirements of this NSPS. Since subpart DD was promulgated prior to August 7, 1980, the grain elevator falls within a listed source category. You include fugitive emissions from the grain elevator to determine if the source is a major stationary source.
- A coal prep plant of the type covered by the NSPS in 40 CFR part 60, subpart Y. The coal prep plant falls within a listed source category as this source category was regulated by subpart Y as of August 7, 1980. The coal prep plant includes emissions units that are not regulated as "affected facilities" under the NSPS. You include fugitive emissions from all emission units at the coal prep plant to determine if the source is a major stationary source, including fugitive emissions from the units that are not regulated as "affected facilities" under the NSPS.

4. A source which emits fugitive emissions of any HAP listed under section 112(b) of the Act.<sup>3</sup> You include fugitive HAP emissions from all emissions units at a source to determine if the source is a major source without regard to whether the source falls within a listed source category. Although most emissions of HAPs are nonfugitive due to advancing technology, some likely emitters of fugitive HAPs as of the date of this letter are pumps, valves, compressors, or flanges found at petroleum refineries, chemical processing plants, tank farms (i.e., facilities which have a collection of storage tanks), and crude oil and natural gas production facilities.

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<sup>3</sup> This scenario is relevant for determining whether a source is a major source for purposes of section 112 and therefore Title V. (See first definition of "major source" in 40 CFR 70.2 and 71.2). The inclusion of fugitive emissions of HAPs in major source determinations is generally not relevant for PSD. The requirements of the PSD program do not apply to pollutants listed as HAPs under section 112(b) of the Act. See 42 U.S.C. § 7412(b)(6).

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In reading this document, please remember that it is not a regulation and does not substitute for the applicable regulations. The Clean Air Act and EPA's regulations governing NSR, PSD, and Title V contain legally binding requirements. In contrast, the statements made in this document do not create legal rights or impose legally binding requirements on EPA, the States, or the regulated community. Rather, the purpose of this document, including the scenarios above, is to help you understand the statutory provisions and regulations which govern when fugitive emissions are included in major source determinations and EPA's interpretation of these provisions and regulations. It is important to note that any decisions regarding a particular facility will be made based on the statute and regulations.

This discussion of various possible scenarios is not exhaustive. In deciding whether to include fugitive emissions from a stationary source in determining major source applicability, you may find the following sources of information useful in addition to those mentioned above:

- "Requirements for Preparation, Adoption, and Submittal of Implementation Plans; Approval and Promulgation of Implementation Plans," 45 Fed. Reg. 52676, 52695 (August 7, 1980)
- "Requirements for Implementation Plans: Surface Coal Mines and Fugitive Emissions; Approval and Promulgation of Implementation Plans," 54 Fed. Reg. 48870, 48881-48882 (Nov. 28, 1989)
- "New Source Performance Standards (NSPS) - Applicability of Standards of Performance for Coal Preparation Plants to Coal Unloading Operations," 63 Fed. Reg. 53288, 53290 (October 5, 1998)
- Letter from Edward J. Lillis to Thomas C. O'Connor; (Oct. 14, 1994) (<http://www.epa.gov/rgytgrnj/programs/artd/air/title5/t5memos/fugitive.pdf>)
- Letter from Robert G. Kellam to Donald P. Gabrielson; (March 1, 1996) (<http://www.epa.gov/rgytgrnj/programs/artd/air/title5/t5memos/donaldpg.pdf>)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

NOV 16 1998

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: National Guidance on Interpretation of the New Source  
Performance Standards- Subpart Y (Standards of  
Performance for Coal Preparation Plants)

FROM: John B. Rasnic, Director  
Manufacturing, Energy and Transportation Division  
Office of Compliance

TO: See Attached List

The purpose of this memorandum is to notify, you of a recent New Source Performance Standards (NSPS) interpretation made from Headquarters regarding coal unloading at coal preparation plants. The Office of Enforcement and Compliance Assurance has determined that coal unloading that involves conveying coal to machinery at coal preparation plants is an affected facility under the NSPS for coal preparation plants (40 CFR Part 60, Subpart Y) and is subject to all requirements applying to "coal processing and conveying equipment." I have attached a copy of this interpretation, which is included in a letter dated October 3, 1997, addressed to Congresswoman Barbara Cubin, for your information. This interpretation, which, is included in the letter and the enclosed Federal Register (FR) Notice, is the Environmental Protection Agency's (EPA) position on coal unloading at coal preparation plants and supersedes any other interpretations, to the extent, that they are inconsistent with it.

The letter to Congresswoman Cubin only addressed the questions raised by ARCO Coal Company, which were:

- 1) Is coal unloading an affected facility under NSPS Subpart Y?; and
- 2) Is coal unloading a part of a source belonging to the coal preparation plant source category?; and
- 3) Must fugitive emissions from coal unloading be counted in determining whether a coal preparation plant is a major source subject to Title V permitting requirements?

We determined the following:

- 1) Coal unloading at a coal preparation plant that involves conveying coal to plant machinery is subject to NSPS Subpart Y;
- 2) All coal unloading at a coal preparation plant is a part of a source belonging to the coal preparation plant source category; and
- 3) Fugitive emissions, if any, from coal unloading must be counted in determining whether a coal preparation plant is a major source subject to Title V permitting requirements.

It is important to emphasize that the letter to Congresswoman Cubin and the recent FR Notice does not include an evaluation of whether emissions from coal unloading operations could reasonably pass through a stack, chimney, vent, or other functionally-equivalent opening. EPA's long-standing policy is that any emissions meeting this criterion are considered nonfugitive emissions and must be counted in major source determinations made under section 302 and part D of Title I of the Clean Air Act. The Cubin letter does not change EPA's long-standing policy regarding whether emissions are to be considered fugitive or nonfugitive, nor does it specifically address whether the emissions from various operations at coal preparation plants are considered fugitive or nonfugitive.

We understand that in the past the responses from some Regions to questions regarding the applicability of NSPS Subpart Y to various coal unloading operations at coal preparation plants were inconsistent with the interpretation included in the letter to Congresswoman Cubin. Therefore, the Office of Compliance is recommending that the following steps be taken. If a Region's policy on NSPS Subpart Y is consistent with the position outlined in the letter to Congresswoman Cubin, then the Region should continue to enforce NSPS Subpart Y as it has previously. However, if a Region's position on NSPS Subpart Y is contrary to the interpretation included in the Cubin letter, then the Region should allow 90 calendar days from the date of the Federal Register Notice for sources to achieve compliance before, enforcing NSPS Subpart Y as it pertains to coal unloading that involves conveying coal to plant machinery at coal preparation plants.

If you have any questions regarding this policy, please Contact Chris Oh of my staff at (202) 564-7004.

Attachments

Addressees:

Ira W. Leighton, Acting Director  
Office of Environmental Stewardship  
Region I

Walter Mugdan, Acting Director  
Division of Enforcement and Compliance Assistance  
Region II

Judith Katz, Director  
Air Protection Division  
Region III

Winston. A. Smith, Director  
Air, Pesticides, and Toxics Management Division  
Region IV

Steve Rothblatt, Acting Director  
Air and Radiation Division  
Region V

Samuel J. Coleman, Director  
Compliance Assurance and Enforcement Division  
Region VI

William A. J. Spratlin  
Air, RCRA, and Toxics Division  
Region VII

Carol Rushin, Assistant Regional Administrator  
Office of Enforcement, Compliance and Environmental Justice  
Region VIII

David P. Howekamp, Director  
Air Division  
Region IX

Anita Frankel, Director  
Office of Air  
Region X

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C. 20460

OCT 3 1997

OFFICE OF  
ENFORCEMENT AND  
COMPLIANCE ASSURANCE

The Honorable Barbara Cubin  
United States House of Representatives  
Washington, D.C. 20515-5001

Dear Congresswoman Cubin:

This is in response to your June 26, 1997, letter regarding how the United States Environmental Protection Agency (EPA) regulates fugitive emissions from coal unloading at coal preparation plants. I regret that the Agency was unable to reply to your request more promptly. The issues you raised required a good deal of research and consideration within the Agency.

We understand that this issue was originally brought to your attention through correspondence sent from the ARCO Coal Company to the National Mining Association (NMA), on July 12, 1995, regarding an EPA Region VIII letter on fugitive emissions from coal unloading. Region VIII concluded that coal unloading is not regulated by the New Source Performance Standard for coal preparation plants (NSPS Subpart Y). The Region also concluded, however, that fugitive emissions from coal dumping at the site of a coal preparation plant must be counted in determining whether a coal preparation plant is a major source subject to Title V permitting requirements.

We have conducted an independent review of both the issues addressed in the Region VIII letter. We have concluded, on the basis of Title V of the Clean Air Act, its implementing regulations, and other related provisions, that fugitive emissions from coal dumping must be included in a determination of whether a coal preparation plant is a major source subject to Title V permitting requirements. Therefore, we agree with Region VIII's conclusion on the Title V issue. However, we do not agree with Region VIII's conclusion that coal unloading is not regulated by NSPS Subpart Y. Based on our reading of NSPS Subpart Y and associated documents, we conclude that coal unloading that involves conveying coal to coal plant machinery is subject to the NSPS.

The reasons for our conclusions are discussed in the enclosed analysis, which should be viewed as an integral part of this response. This response provides the Agency's current position and supersedes Region VIII's earlier letter, to the extent it is inconsistent with this response.

This response was coordinated with Region VIII, EPA's Office of General Counsel (OGC), and the Office of Air Quality Planning and Standards (OAQPS) in Research Triangle Park, North Carolina. Any questions regarding this response should be directed to Chris Oh of my staff at (202) 564-7004.

Sincerely,

Steven A. Herman

Enclosure

September 11, 1997

Analysis Regarding Regulatory Status of Fugitive Emissions From  
Coal Unloading at Coal Preparation Plants

This analysis addresses the treatment of fugitive emissions from coal unloading at coal preparation plants. The first question is whether coal unloading is regulated under the New Source Performance Standard (NSPS) for coal preparation plants, 40 CFR Part 60 Subpart Y. The second question is whether fugitive emissions from coal unloading must be included in determining whether the plant is a major source subject to Title V permitting requirements. In this analysis, we use the term "coal unloading" to encompass "coal truck dumping" and "coal truck unloading," as well as dumping or unloading from trains, barges, mine cars, and conveyors.

In a February 24, 1995, letter to the Wyoming Department of Environmental, Quality, signed by the Branch Chief for Air Programs, EPA Region VIII concluded that coal unloading is not regulated by NSPS Subpart Y (i.e., is not an "affected facility"). Region VIII approached the Title V issue by first determining whether coal unloading is part of the NSPS coal preparation plant source category. Having decided that coal unloading at the coal preparation plant site is part of the source category, Region VIII concluded that fugitive emissions from coal unloading must be included in determining whether the plant is a major source subject to Title V permitting requirements.

Our independent review of NSPS Subpart Y and associated documents leads us to conclude that coal unloading that involves conveying coal to plant machinery is regulated under Subpart Y. Thus, we disagree with the Region VIII letter to the extent it says that this type of coal unloading is not an affected facility. We agree with Region VIII's conclusion that fugitive emissions from coal unloading must be included in determining whether the plant is a major source subject to Title, V permitting requirements. However, the relevant Title V regulations and related provisions indicate that the analysis should focus on the "source" rather than the "source category." In other words, the



central question is not whether coal unloading is within the NSPS source category. Rather, it is whether coal unloading at a coal preparation plant is part of the source that belongs to this source category.

Accordingly, this analysis primarily addresses two issues: whether coal unloading is an affected facility under NSPS Subpart Y and whether coal unloading is part of the source belonging to the coal preparation plant NSPS source category. Underlying the second issue is the question of whether fugitive emissions associated with coal unloading should be included in major source determinations.

The question of whether fugitive emissions from coal unloading should be included in major source determinations has implications for permitting requirements under Title V of the Clean Air Act ("CAA" or "the Act"). Under the current Title V implementing regulations, States must require "major sources" to obtain a permit. 40 CFR section 70.3. "Major source," in turn, is defined as "any stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person (or persons under common control)) belonging to a single major industrial grouping . . ." that is also a major source under section 112 or a major stationary source under section 302 or part D of Title I of the Act. 40 CFR section 70.2. Relevant to the analysis here is the section 302(j) definition of major, stationary source as any stationary source that emits or has the potential to emit 100 tons per year (tpy) or more of any air pollutant. Section 302(j) also provides that fugitive emissions count towards the 100 tpy threshold as determined by EPA by rule.

Pursuant to CAA section 302(j), the EPA has determined by rule that fugitive emissions count towards the major source threshold for all sources that belong to source categories regulated under the New Source Performance Standards (NSPS) as of August 7, 1980. 49 FR 43202, 43209 (October 26, 1984). Because coal preparation plants are regulated by an NSPS (40 CFR part 60, Subpart Y) which was proposed on October 24, 1974 and promulgated on January 15, 1976, fugitive emissions from sources that belong to the coal preparation plant source category count towards this threshold. Thus, if coal unloading is part of the source belonging to the coal preparation plant source category, then

fugitive emissions from coal unloading must be included in the major source determination.

After a careful review of NSPS Subpart Y, the relevant Title V regulations, and associated documents; we conclude that: 1) Coal unloading that involves conveying coal to plant machinery is an affected facility under NSPS Subpart Y; and 2) All coal unloading at a coal preparation plant is a part of the source belonging to the coal preparation plant source category. We also determine that all coal unloading at a coal preparation plant fits within the NSPS source category. Finally, we conclude that fugitive emissions from coal unloading must be counted in determining whether a coal preparation plant is a major source subject to Title V permitting requirements. The reasons for our conclusions are discussed below.

Issue I: Is coal unloading an affected facility under NSPS Subpart Y?

In NSPS Subpart Y, several emission points are identified and regulated as part of a coal preparation plant. Subpart Y lists the following affected facilities: thermal dryers, pneumatic coal-cleaning equipment (air tables), coal processing and conveying equipment (including breakers and crushers), coal storage systems, and coal transfer and loading systems. Because coal unloading is not specifically listed, the relevant question is whether it is covered under one of the listed affected facilities.

EPA concludes that coal unloading that involves conveying coal to plant machinery fits within the definition of "coal processing and conveying equipment." 40 CFR section 60.251(g) defines "coal processing and conveying equipment" as "any machinery used to reduce the size of coal or to separate coal from refuse, and the equipment used to convey coal to or remove coal and refuse from the machinery. This includes, but is not limited to, breakers, crushers, screens, and conveyor belts." The key phrases are "the equipment used to convey coal to... machinery" and "but is not limited to." While the "equipment" involved in coal unloading varies from plant to plant (the definition is written broadly enough to accommodate the differences) what is important is that the equipment perform the function of conveying. It should be noted that if the coal is

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unloaded for the purpose of storage, then the unloading activity is not an affected facility under NSPS Subpart Y. The coal must be directly unloaded into receiving equipment, such as a hopper, to be subject to the provisions of NSPS Subpart Y.

In addressing this question, we also reviewed a number of supplementary documents associated with NSPS Subpart Y.<sup>1</sup> The supplementary documents, with one exception, are consistent with our conclusion that coal unloading, if it involves conveying coal to plant machinery, is an affected facility.

The 1977 Inspection Manual identifies coal unloading areas as key areas for fugitive emissions. It addresses fugitive emissions from coal unloading in the context of both emission performance tests and periodic compliance inspections. The manual states that the emission performance tests are "intended to serve as a basis for determining [the] compliance status of the plant during later inspections." The manual provides a checklist for recording test results; this checklist includes places for recording emission opacity percentages associated with unloading from trucks, barges, or railroads. The manual also instructs the inspectors to use the emissions test checklist for periodic compliance inspections. The inspectors are instructed to compare current plant operations with those recorded during the emissions performance tests. Clearly, this manual, which was issued less than a year after Subpart Y was promulgated, treats coal unloading as an affected facility.

The 1980 Review, in contrast, states that "[a] significant source of potential fugitive emission not regulated by current NSPS are coal unloading or receiving systems." This is later tempered by the statement that "coal unloading systems were not mentioned as affected facilities." The 1980 Review does not explore whether coal unloading, although not specifically listed,

<sup>1</sup>The documents used in this discussion are the following: EPA document number 340/1-77-022 (dated 11/77): "Inspection Manual for Enforcement of New Source Performance Standards: Coal Preparation Plants" ("1977 Inspection Manual"); EPA document number 450/3-80-022 (dated 12/80): "A Review of Standards of Performance for New Stationary Sources - Coal Preparation Plants" ("1980 Review"); EPA document number 450/3-88-001 (dated 2/88): "Second Review of New Source Performance Standards for Coal Preparation Plants" ("1988 Review").

might be covered by the definition of "coal processing and conveying equipment."

The 1988 Review does not specifically address coal unloading as an affected facility, but it assumes that coal unloading is one of the sources of fugitive emissions covered by the NSPS. For example, the 1988 Review identifies truck dumps as one of the sources of fugitive emissions at a coal preparation plant and lays out the cost of controlling fugitive emission sources at the plant. These cost figures are used in calculating the cost effectiveness of the existing NSPS. This cost effectiveness calculation is based on the premise that complying with the NSPS means controlling fugitive emissions, including emissions from truck dumps.

In light of the above information, EPA concludes that coal unloading that involves conveying coal to machinery at coal preparation plants is an affected facility under the NSPS for coal preparation plants (40 CFR Part 60, Subpart Y) and is subject to all requirements applying to "coal processing and conveying equipment." We recognize that past determinations on the applicability of Subpart Y to coal unloading varied from Region to Region. Therefore, we will notify all Regional Offices of this conclusion. In the Regions that have been exempting coal unloading from NSPS Subpart Y, no penalties will be sought for past violations. We expect that coal preparation plants will be able to control emissions from such coal unloading in the future through use of add-on controls.

Issue II: Is coal unloading part of the source that belongs to the source category for coal preparation plants?

Whether a facility has been regulated as an affected facility does not determine whether fugitive emissions from that facility are to be counted in determining whether the source as a whole is major under Title V. Rather, if the facility is part of a source that falls within a source category which has been listed pursuant to section 302(j) of the Act, then all fugitive emissions of any regulated air pollutant from that facility are to be included in determining whether that source is a major stationary source under section 302 or part D of Title I of the Act and accordingly required to obtain a Title V permit.

Section 302(j) of the Act provides that EPA may determine whether fugitive emissions from a "stationary source" count towards the major source threshold. For purposes of the 302(j) rulemaking, the term "stationary source" is defined as "any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act." 40 CFR sections 51.166(b)(5) and 52.21(b)(5). Building, structure, facility, or installation means "all of the pollutant emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel." 40 CFR sections 51.166(b)(6) and 52.21(b)(6).

EPA has determined by rule that fugitive emissions count towards the major source threshold for all sources that belong to the source category regulated by NSPS Subpart Y. 49 FR 43202, 43209 (October 26, 1984). Under the definition of source used in the 302(j) rulemaking, all types of coal unloading at coal preparation plants are covered. Coal unloading normally belongs to the same industrial grouping as other activities at coal preparation plants, is located on contiguous or adjacent property, and is under common control. Therefore, we conclude that all coal unloading at a coal preparation plant is part of the source belonging to the source category for coal preparation plants.

Coal unloading of all types also fits within the NSPS source category. A survey of EPA Regional Offices indicated that the majority of the Regions treat coal unloading at a coal preparation plant as being within the NSPS source category. Coal unloading that is regulated under Subpart Y is clearly within the source category. Common sense would dictate that coal unloading for temporary storage be treated no differently. It is performed at the same facility and is an integral part of the operations at that facility. The latter type of coal unloading is simply an optional first step in the coal preparation process.

We conclude that fugitive emissions from coal unloading must be counted in determining whether a coal preparation plant is a major source subject to Title V permitting requirements.

## CONNECTICUT—CARBON MONOXIDE—Continued

Designated area	Designation		Classification	
	Date	Type	Date	Type
Bridgewater Town, New Milford Town AQCR 041 Eastern Connecticut Intrastate. .... Middlesex County (part): All portions except cities and towns in Hartford Area New London County: Tolland County (part): All portions except cities and towns in Hartford Area Windham County: AQCR 044 Northwestern Connecticut Intrastate. .... Hartford County (part) Hartland Township Litchfield County (part): All portions except cities and towns in Hartford, New Haven, and New York Areas.	.....	Unclassifiable/Attainment.		
	.....	Unclassifiable/Attainment.		

\* \* \* \* \*

[FR Doc. 98-26453 Filed 10-2-98; 8:45 am]

BILLING CODE 6560-50-P

**ENVIRONMENTAL PROTECTION AGENCY****40 CFR Part 60****[FRL-6168-9]****New Source Performance Standards (NSPS)—Applicability of Standards of Performance for Coal Preparation Plants to Coal Unloading Operations****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Interpretation of standards of performance.

**SUMMARY:** EPA issued an interpretation of the New Source Performance Standards (NSPS) for Coal Preparation Plants, 40 CFR part 60, subpart Y, on October 3, 1997, in response to an inquiry from the Honorable Barbara Cubin, United States House of Representatives. After a careful review of NSPS Subpart Y, the relevant regulations under Title V of the Clean Air Act, and associated documents, EPA issued an interpretation concluding that coal unloading that involves conveying coal to coal plant machinery is subject to the NSPS, and that fugitive emissions, if any, from coal dumping must be included in a determination of whether a coal preparation plant is a major source subject to Title V permitting requirements. The full text of the interpretation appears in the **SUPPLEMENTARY INFORMATION** section of today's document.

**FOR FURTHER INFORMATION CONTACT:** Mr. Chris Oh, United States Environmental Protection Agency (2223A), 401 M

Street, SW., Washington, D.C. 20460, telephone (202) 564-7004.

**SUPPLEMENTARY INFORMATION:** This interpretation does not supersede, alter, or in any way replace the existing NSPS Subpart Y—Standards of Performance for Coal Preparation Plants. This notice is intended solely as a guidance and does not represent an action subject to judicial review under section 307(b) of the Clean Air Act or section 704 of the Administrative Procedures Act.

**Analysis Regarding Regulatory Status of Fugitive Emissions From Coal Unloading at Coal Preparation Plants**

This analysis addresses the treatment of fugitive emissions from coal unloading at coal preparation plants. The first question is whether coal unloading is regulated under the New Source Performance Standard (NSPS) for coal preparation plants, 40 CFR part 60, subpart Y. The second question is whether fugitive emissions from coal unloading must be included in determining whether the plant is a major source subject to Title V permitting requirements. In this analysis, we use the term "coal unloading" to encompass "coal truck dumping" and "coal truck unloading," as well as dumping or unloading from trains, barges, mine cars, and conveyors.

In a February 24, 1995, letter to the Wyoming Department of Environmental Quality, signed by the Branch Chief for Air Programs, EPA Region VIII concluded that coal unloading is not regulated by NSPS Subpart Y (i.e., is not an "affected facility"). Region VIII approached the Title V issue by first determining whether coal unloading is part of the NSPS coal preparation plant source category. Having decided that coal unloading at the coal preparation plant site is part of the source category,

Region VIII concluded that fugitive emissions from coal unloading must be included in determining whether the plant is a major source subject to Title V permitting requirements.

Our independent review of NSPS Subpart Y and associated documents leads us to conclude that coal unloading that involves conveying coal to plant machinery is regulated under Subpart Y. Thus, we disagree with the Region VIII letter to the extent it says that this type of coal unloading is not an affected facility. We agree with Region VIII's conclusion that fugitive emissions from coal unloading must be included in determining whether the plant is a major source subject to Title V permitting requirements. However, the relevant Title V regulations and related provisions indicate that the analysis should focus on the "source" rather than the "source category." In other words, the central question is not whether coal unloading is within the NSPS source category. Rather, it is whether coal unloading at a coal preparation plant is part of the source that belongs to this source category.

Accordingly, this analysis primarily addresses two issues: whether coal unloading is an affected facility under NSPS Subpart Y, and whether coal unloading is part of the source belonging to the coal preparation plant NSPS source category. Underlying the second issue is the question of whether fugitive emissions associated with coal unloading should be included in major source determinations.

The question of whether fugitive emissions from coal unloading should be included in major source determinations has implications for permitting requirements under Title V of the Clean Air Act ("CAA" or "the Act"). Under the current Title V

implementing regulations, States must require "major sources" to obtain a permit. 40 CFR 70.3. "Major source," in turn, is defined as "any stationary source (or any group of stationary sources that are located on one or more contiguous or adjacent properties, and are under common control of the same person (or persons under common control)) belonging to a single major industrial grouping \* \* \*" that is also a major source under section 112 or a major stationary source under section 302 or part D of Title I of the Act. 40 CFR 70.2. Relevant to the analysis here is the section 302(j) definition of major stationary source as any stationary source that emits or has the potential to emit 100 tons per year (tpy) or more of any air pollutant. Section 302(j) also provides that fugitive emissions count towards the 100 tpy threshold as determined by EPA by rule.

Pursuant to CAA section 302(j), the EPA has determined by rule that fugitive emissions count towards the major source threshold for all sources that belong to source categories regulated under the New Source Performance Standards (NSPS) as of August 7, 1980. 49 FR 43202, 43209 (October 26, 1984). Because coal preparation plants are regulated by an NSPS (40 CFR part 60, subpart Y) which was proposed on October 24, 1974 and promulgated on January 15, 1976, fugitive emissions from sources that belong to the coal preparation plant source category count towards this threshold. Thus, if coal unloading is part of the source belonging to the coal preparation plant source category, then fugitive emissions from coal unloading must be included in the major source determination.

After a careful review of NSPS Subpart Y, the relevant Title V regulations, and associated documents, we conclude that: (1) Coal unloading that involves conveying coal to plant machinery is an affected facility under NSPS Subpart Y; and (2) All coal unloading at a coal preparation plant is a part of the source belonging to the coal preparation plant source category. We also determine that all coal unloading at a coal preparation plant fits within the NSPS source category. Finally, we conclude that fugitive emissions from coal unloading must be counted in determining whether a coal preparation plant is a major source subject to Title V permitting requirements. The reasons for our conclusions are discussed below.

### **I. Is Coal Unloading an Affected Facility Under NSPS Subpart Y?**

In NSPS Subpart Y, several emission points are identified and regulated as

part of a coal preparation plant. Subpart Y lists the following affected facilities: thermal dryers, pneumatic coal-cleaning equipment (air tables), coal processing and conveying equipment (including breakers and crushers), coal storage systems, and coal transfer and loading systems. Because coal unloading is not specifically listed, the relevant question is whether it is covered under one of the listed affected facilities.

EPA concludes that coal unloading that involves conveying coal to plant machinery fits within the definition of "coal processing and conveying equipment." 40 CFR 60.251(g) defines "coal processing and conveying equipment" as "any machinery used to reduce the size of coal or to separate coal from refuse, and the equipment used to convey coal to or remove coal and refuse from the machinery. This includes, but is not limited to, breakers, crushers, screens, and conveyor belts." The key phrases are "the equipment used to convey coal to \* \* \* machinery" and "but is not limited to." While the "equipment" involved in coal unloading varies from plant to plant (the definition is written broadly enough to accommodate the differences), what is important is that the equipment perform the function of conveying. It should be noted that if the coal is unloaded for the purpose of storage, then the unloading activity is not an affected facility under NSPS Subpart Y. The coal must be directly unloaded into receiving equipment, such as a hopper, to be subject to the provisions of NSPS Subpart Y.

In addressing this question, EPA also reviewed a number of supplementary documents associated with NSPS Subpart Y.<sup>1</sup> The supplementary documents, with one exception, are consistent with our conclusion that coal unloading, if it involves conveying coal to plant machinery, is an affected facility.

The 1977 Inspection Manual identifies coal unloading areas as key areas for fugitive emissions. It addresses fugitive emissions from coal unloading in the context of both emission performance tests and periodic compliance inspections. The manual states that the emission performance

tests are "intended to serve as a basis for determining [the] compliance status of the plant during later inspections." The manual provides a checklist for recording test results; this checklist includes places for recording emission opacity percentages associated with unloading from trucks, barges, or railroads. The manual also instructs the inspectors to use the emissions test checklist for periodic compliance inspections. The inspectors are instructed to compare current plant operations with those recorded during the emissions performance tests. Clearly, this manual, which was issued less than a year after Subpart Y was promulgated, treats coal unloading as an affected facility.

The 1980 Review, in contrast, states that "[a] significant source of potential fugitive emission not regulated by current NSPS are coal 'unloading' or 'receiving' systems." This is later tempered by the statement that "coal unloading systems were not mentioned as affected facilities." The 1980 Review does not explore whether coal unloading, although not specifically listed, might be covered by the definition of "coal processing and conveying equipment."

The 1988 Review does not specifically address coal unloading as an affected facility, but it assumes that coal unloading is one of the sources of fugitive emissions covered by the NSPS. For example, the 1988 Review identifies truck dumps as one of the sources of fugitive emissions at a coal preparation plant and lays out the cost of controlling fugitive emission sources at the plant. These cost figures are used in calculating the cost effectiveness of the existing NSPS. This cost effectiveness calculation is based on the premise that complying with the NSPS means controlling fugitive emissions, including emissions from truck dumps.

In light of the above information, EPA concludes that coal unloading that involves conveying coal to machinery at coal preparation plants is an affected facility under the NSPS for coal preparation plants (40 CFR part 60, subpart Y) and is subject to all requirements applying to "coal processing and conveying equipment." EPA recognizes that past determinations on the applicability of Subpart Y to coal unloading varied from Region to Region. Therefore, we will notify all Regional Offices of this conclusion. In the Regions that have been exempting coal unloading from NSPS Subpart Y, no penalties will be sought for past violations. We expect that coal preparation plants will be able to control emissions from such coal

<sup>1</sup> The documents used in this discussion are the following: EPA document number 340/1-77-022 (dated 11/77): "Inspection Manual for Enforcement of New Source Performance Standards: Coal Preparation Plants" ("1977 Inspection Manual"); EPA document number 450/3-80-022 (dated 12/80): "A Review of Standards of Performance for New Stationary Sources—Coal Preparation Plants" ("1980 Review"); EPA document number 450/3-88-001 (dated 2/88): "Second Review of New Source Performance Standards for Coal Preparation Plants" ("1988 Review").

unloading in the future through use of add-on controls.

## II. Is Coal Unloading Part of the Source That Belongs to the Source Category for Coal Preparation Plants?

Whether a facility has been regulated as an affected facility does not determine whether fugitive emissions from that facility are to be counted in determining whether the source as a whole is major under Title V. Rather, if the facility is part of a source that falls within a source category which has been listed pursuant to section 302(j) of the Act, then all fugitive emissions of any regulated air pollutant from that facility are to be included in determining whether that source is a major stationary source under section 302 or part D of Title I of the Act and accordingly required to obtain a Title V permit.

Section 302(j) of the Act provides that EPA may determine whether fugitive emissions from a "stationary source" count towards the major source threshold. For purposes of the 302(j) rulemaking, the term "stationary source" is defined as "any building, structure, facility, or installation which emits or may emit any air pollutant subject to regulation under the Act." 40 CFR 51.166(b)(5) and 52.21(b)(5). Building, structure, facility, or installation means "all of the pollutant emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control) except the activities of any vessel." 40 CFR 51.166(b)(6) and 52.21(b)(6).

EPA has determined by rule that fugitive emissions count towards the major source threshold for all sources that belong to the source category regulated by NSPS Subpart Y. 49 FR 43202, 43209 (October 26, 1984). Under the definition of source used in the 302(j) rulemaking, all types of coal unloading at coal preparation plants are covered. Coal unloading normally belongs to the same industrial grouping as other activities at coal preparation plants, is located on contiguous or adjacent property, and is under common control. Therefore, EPA concludes that all coal unloading at a coal preparation plant is part of the source belonging to the source category for coal preparation plants.

Coal unloading of all types also fits within the NSPS source category. A survey of EPA Regional Offices indicated that the majority of the Regions treat coal unloading at a coal preparation plant as being within the NSPS source category. Coal unloading

that is regulated under Subpart Y is clearly within the source category. Common sense would dictate that coal unloading for temporary storage be treated no differently. It is performed at the same facility and is an integral part of the operations at that facility. The latter type of coal unloading is simply an optional first step in the coal preparation process.

EPA concludes that fugitive emissions from coal unloading must be counted in determining whether a coal preparation plant is a major source subject to Title V permitting requirements.

Dated: September 16, 1998.

**Kenneth A. Gigliello,**

*Acting Director, Manufacturing, Energy and Transportation Division, Office of Compliance.*

[FR Doc. 98-26632 Filed 10-2-98; 8:45 am]

BILLING CODE 6560-50-P

## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 82

[FRL-6171-9]

### Protection of Stratospheric Ozone: Reconsideration of Petition Criteria and Incorporation of Montreal Protocol Decisions

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Partial withdrawal of direct final rule.

**SUMMARY:** With this action, due to receipt of adverse comments, EPA is withdrawing thirteen of the provision included in the direct final rule published in the **Federal Register** on August 4, 1998. EPA published both the direct final rule (63 FR 41625) and a notice of proposed rulemaking (63 FR 41652) on August 4, 1998, to reflect changes in U.S. obligations under the Montreal Protocol on Substance that Deplete the Ozone Layer (Protocol) due to recent decision by signatory countries to this international agreement, to respond to a petition regarding the requirement in the petition process for imports of used class I controlled substances that a person must certify knowledge of tax liability, and to ease the burden on affected companies while continuing to ensure compliance with Title VI of the CAA and meet U.S. obligation under the Protocol.

**DATES:** The following provisions of the direct final rule published at 63 FR 41626 (August 4, 1998) are withdrawn, as of October 5, 1998.

(1) The addition to 40 CFR 82.3 of the definition for "individual shipment,"

(2) The addition to 40 CFR 82.3 of the definition for "national security allowances,"

(3) The addition to 40 CFR 82.3 of the definition for "non-objection notice,"

(4) The addition to 40 CFR 82.3 of the definition for "source facility,"

(5) The revision of newly designated 40 CFR 82.4(j),

(6) The addition of paragraph (t)(3) in newly designated 40 CFR 80.4(t),

(7) The addition of paragraph (u)(3) in newly designated 40 CFR 80.4(u),

(8) The addition of paragraph (a)(5) in revised 40 CFR 82.9(a),

(9) The addition of 40 CFR 82.9(g),

(10) The addition of 40 CFR 82.12(a)(3),

(11) The addition of 40 CFR 82.13(f)(2)(xvii), (g)(1)(xvii), and (g)(4)(xv) and the revision of newly designated 40 CFR 82.13(f)(3)(xiii),

(12) The revision of 40 CFR 82.13(g)(2) and (3), and

(13) The revision of 40 CFR 82.13(u).

**ADDRESSES:** Comments and materials supporting this rulemaking are contained in Public Docket No. A-92-13 at: U.S. Environmental Protection Agency, 401 M Street SW, Washington, D.C. 20460. The Public docket is located in Room M-1500, Waterside Mall (Ground Floor). Dockets may be inspected from 8 a.m. until 12 noon, and from 1:30 p.m. until 3 p.m., Monday through Friday. A reasonable fee may be charged for copying docket materials.

### FOR FURTHER INFORMATION CONTACT:

Tom Land, U.S. Environmental Protection Agency, Stratospheric Protection Division, Office of Atmospheric Programs, 6205J, 401 M Street, SW., Washington, DC, 20460, (202)-564-9185.

**SUPPLEMENTARY INFORMATION:** As stated in the **Federal Register** document, if adverse comments were received by September 3, 1998 on one or more of the provisions, a timely notice of withdrawal would be published in the **Federal Register**. EPA received adverse comments on the following thirteen provisions: (1) the addition to 40 CFR 82.3 of the definition for "individual shipment," (2) the addition to 40 CFR 82.3 of the definition for "national security allowances," (3) the addition to 40 CFR 82.3 of the definition for "non-objection notice," (4) the addition to 40 CFR 82.3 of the definition for "source facility," (5) the revision to newly designated 40 CFR 82.4(j) prohibiting the import of used class I controlled substance without a non-objection notice, (6) the addition to newly designated 40 CFR 82.4(t) of paragraph (t)(3), under which EPA would allocate



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
Washington, D.C. 20460

JUN 13 1989

MEMORANDUM

SUBJECT: Guidance on Limiting Potential to Emit in New Source Permitting

FROM: Terrell E. Hunt  
Associate Enforcement Counsel  
Air Enforcement Division  
Office of Enforcement and Compliance Monitoring

John S. Seitz, Director  
Stationary Source Compliance Division  
Office of Air Quality Planning and Standards

TO: Addressees

This memorandum transmits the final guidance on conditions in construction permits which can legally limit a source's potential to emit to minor or de minimis levels. We received many helpful comments on the January 24, 1989 draft of this guidance, and have incorporated the comments into the final document wherever possible. A summary of the major changes which have been made to the guidance in response to these comments is provided below.

Several commenters noted that the draft guidance used the term "federally enforceable" to mean both federally enforceable as defined in the new source regulations (40 C.F.R. Sections 52.21(b) (17), 51.165(a) (1) (xiv), 51.166(b) (17)), and enforceable as a practical matter. We have tried to distinguish the places where each term should be used, explained the relationship between the two terms, and indicated that in order to properly restrict potential to emit, limitations must be both federally enforceable as defined in the regulations and practically enforceable.

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Some commenters requested that the section on averaging times for production limits be more specific as to when it is appropriate to use limitations which exceed a one month time basis. We have tried to explain why it is not possible to develop generic criteria for making this distinction, and to indicate situations where exceptions to the policy that production and operation limitations not exceed one month may be warranted.

There were some requests for a section on enforcement. We have included a new Section VI which addresses this topic. We also received many good suggestions on the example permit limitations. The section on examples has been substantially reworked to reflect your comments.

Finally, we learned through the comments that in two specific circumstances, short term emission limits are the most useful and reasonable way to restrict and verify limits on potential to emit. These circumstances are: 1) when control equipment is installed but control equipment operating parameters are difficult to measure during enforcement inspections; and 2) in surface coating operations with numerous and unpredictable use of coatings containing varying VOC content, where add-on control equipment is not employed. Therefore, we have made a narrow exception to the flat prohibition on use of emission limits to restrict potential to emit for these specific circumstances, and only when certain additional conditions have been met.

Again, we appreciate the thoughtful comments we have received on this guidance. Please insert this document into your Clean Air Act Compliance/Enforcement Policy Compendium as Item Number H.3. If you have any questions, please contact Judith Katz in the Air Enforcement Division at FTS 382-2843, or Sally Farrell in the Stationary Source Compliance Division at FTS 382-2875.

Addressees:

Regional Counsels  
Regions I-X

Regional Counsel Air Branch Chiefs  
Regions I-X

Air Management Division Directors  
Regions I, III, and IX

Air and Waste Management Division Director  
Region II

-3-

Air, Pesticides, and Toxics Management Division Directors  
Regions IV and VI

Air and Radiation Division Director  
Region V

Air and Toxics Division Directors  
Regions VII, VIII and X

Air Compliance Branch Chiefs  
Regions I-X

New Source Review Contacts  
Regions I-X

Alan Eckert  
Associate General Counsel

Greg Foote, OGC  
Gary McCutchen, NSRS, AQMD  
David Solomon, NSRS, AQMD  
Sally Farrell, SSCD  
Judy Katz, AED

David Buente, Chief

Environmental Enforcement Section

DOJ

LIMITING POTENTIAL TO EMIT IN NEW SOURCE PERMITTING

JUNE 13, 1989

AIR ENFORCEMENT DIVISION  
OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING

STATIONARY SOURCE COMPLIANCE DIVISION  
OFFICE OF AIR QUALITY PLANNING AND STANDARDS

## Limiting Potential to Emit in New Source Permitting

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## Limiting Potential to Emit in New Source Permitting

### I. Introduction

Whether a new source or modification is major and subject to new source review under Parts C and D of the Clean Air Act is dependent on whether that source or modification has or will have the potential to emit major or significant amounts of a regulated pollutant. Therefore, the definition of "potential to emit" under the new source regulations is extremely important in determining the applicability of new source review to a particular source. The federal regulations define "potential to emit" as:

the maximum capacity of a stationary source to emit a pollutant under its physical and operational design. Any physical or operational limitation on the capacity of the source to emit a pollutant, including air pollution control equipment and restrictions on hours of operation or on the type or amount of fuel combusted, stored or processed, shall be treated as part of its design if the limitation or the effect it would have on emissions is federally enforceable.

40 C.F.R Sections 52.21(b) (4), 51.165(a) (1) (iii), 51.166(b) (4).

Permit limitations are very significant in determining whether a source is subject to major new source review. This is because they are the easiest and most common way for a source to obtain restrictions on its potential to emit. A permit does not

have to be a major source permit to legally restrict potential emissions. A minor source construction permit issued pursuant to a state program approved by EPA as meeting the requirements of 40 C.F.R. Section 51.160 is federally enforceable. In fact, any permit limitation can legally restrict potential to emit if it meets two criteria: 1) it is federally enforceable as defined by 40 C.F.R. Sections 52.21(b) (17), 51.165(a) (1) (xiv), 51.166(b) (17), i.e., contained in a permit issued pursuant to an EPA-approved permitting program or a permit directly issued by EPA, or has been submitted to EPA as a revision to a State Implementation Plan and approved as such by EPA; and 2) it is enforceable as a practical matter. The second criterion is an implied requirement of the first criterion. A permit requirement may purport to be federally enforceable, but, in reality cannot be federally enforceable if it cannot be enforced as a practical matter.

Non-permit limitations can also legally restrict potential to emit. These limitations include New Source Performance Standards codified at 40 C.F.R. Part 60 and National Emission Standards for Hazardous Air Pollutants codified at 40 C.F.R. Part 61.

The appropriate means of restricting potential to emit through permit conditions has been an issue in recent enforcement cases. Through these cases and through guidance issued by EPA, the Agency has addressed three questions: what types of permit

limitations can legally limit potential to emit; whether long averaging times for production limitations are enforceable as a practical matter; and whether sources may limit potential to emit to minor source levels as a means of circumventing the preconstruction review requirements of major source review.

## II. The Louisiana-Pacific Case

In United States v. Louisiana-Pacific Corporation, 682 F. Supp. 1122 (D. Colo. Oct. 30, 1987) and 682 F. Supp. 1141 (D. Colo. March 22, 1988), Judge Alfred Arraj discussed the type of permit restrictions which can be used to limit a source's potential to emit. The Judge concluded that:

... not all federally enforceable restrictions are properly considered in the calculation of a source's potential to emit. While restrictions on hours of operation and on the amount of materials combusted or produced are properly included, blanket restrictions on actual emissions are not.

682 F. Supp. at 1133.

The Court held that Louisiana-Pacific's permit conditions which limited carbon monoxide emissions to 78 tons per year and volatile organic compounds to 101.5 tons per year should not be considered in determining "potential to emit" because these blanket emission limits did not reflect the type of permit conditions which restricted operations or production such as limits on hours of operation, fuel consumption, or final product.



The Louisiana-Pacific court was guided in its reasoning by the D.C. Circuit's holding in Alabama Power v. Costle, 636 F. 2d 323 (D.C. Circuit 1979). Before Alabama Power, EPA regulations required potential to emit to be calculated according to a source's maximum uncontrolled emissions. In Alabama Power, the D. C. Circuit remanded those regulations to EPA with instructions that the Agency include the effect of in-place control equipment in defining potential to emit. EPA went beyond the minimum dictates of the D.C. Circuit in promulgating revised regulations in 1980 to include, in addition to control equipment, any federally enforceable physical or operational limitation. The Louisiana-Pacific court found that blanket limits on emissions did not fit within the concept of proper restrictions on potential to emit as set forth by Alabama Power.

Moreover, Judge Arraj found that:

...a fundamental distinction can be drawn between the federally enforceable limitations which are expressly included in the definition of potential to emit and (emission) limitations.... Restrictions on hours of operation or on the amount of material which may be combusted or produced ... are, relatively speaking, much easier to "federally enforce." Compliance with such conditions could be easily verified through the testimony of officers, all manner of internal correspondence and accounting, purchasing and production records. In contrast, compliance with blanket restrictions on actual emissions would be virtually impossible to verify or enforce.

Id. Thus, Judge Arraj found that blanket emission limits were not enforceable as a practical matter.

Finally, the Court reasoned that allowing blanket emission limitation to restrict potential to emit would violate the intent of Congress in establishing the Prevention of Significant Deterioration (PSD) program.

### III. Types of Limitations that will Restrict Potential to Emit

As an initial matter in this discussion, a few important terms should be defined. Emission limits are restrictions over a given period of time on the amount of a pollutant which may be emitted from a source into the outside air. Production limits are restrictions on the amount of final product which can be manufactured or otherwise produced at a source. Operational limits are all other restrictions on the manner in which a source is run, including hours of operation, amount of raw material consumed, fuel combusted, or conditions which specify that the source must install and maintain add-on controls that operate at a specified emission rate or efficiency. All production and operational limits except for hours of operation are limits on a source's capacity utilization. Potential emissions are defined as the product of a source's emission rate at maximum operating capacity, capacity utilization, and hours of operation.

To appropriately limit potential to emit consistent with the opinion in Louisiana-Pacific, all permits issued pursuant to 40 C.F.R. Sections 51.160, 51.166, 52.21 and 51.165 must contain a

production or operational limitation in addition to the emission limitation in cases where the emission limitation does not reflect the maximum emissions of the source operating at full design capacity without pollution control equipment. Restrictions on production or operation that will limit potential to emit include limitations on quantities of raw materials consumed, fuel combusted, hours of operation, or conditions which specify that the source must install and maintain controls that reduce emissions to a specified emission rate or to a specified efficiency level. Production and operational limits must be stated as conditions that can be enforced independently of one another. For example, restrictions on fuel which relates to both type and amount of fuel combusted should state each as an independent condition in the permit. This is necessary for purposes of practical enforcement so that, if one of the conditions is found to be difficult to monitor for any reason, the other may still be enforced.

When permits contain production or operational limits, they should also have recordkeeping requirements that allow a permitting agency to verify a source's compliance with its limits. For example, permits with limits on hours of operation or amount of final product should require an operating log to be kept in which the hours of operation and the amount of final product produced are recorded. These logs should be available

for inspection should staff of a permitting agency wish to check a source's compliance with the terms of its permit.

When permits require add-on controls operated at a specified efficiency level, permit writers should include, so that the operating efficiency condition is enforceable as a practical matter, those operating parameters and assumptions which the permitting agency depended upon to determine that the control equipment would have a given efficiency.

An emission limitation alone would limit potential to emit only when it reflects the absolute maximum that the source could emit without controls or other operational restrictions. When a permit contains no limits on capacity utilization or hours of operation, the potential to emit calculation should assume operation at maximum design or achievable capacity (whichever is higher) and continuous operation (8760 hours per year).

The particular circumstances of some individual sources make it difficult to state operating parameters for control equipment limits in a manner that is easily enforceable as a practical matter. Therefore, there are two exceptions to the absolute prohibition on using blanket emission limits to restrict potential to emit. If the permitting agency determines that setting operating parameters for control equipment is infeasible in a particular situation, a federally enforceable permit

containing short term emission limits (e.g. lbs per hour) would be sufficient to limit potential to emit, provided that such limits reflect the operation of the control equipment, and the permit includes requirements to install, maintain, and operate a continuous emission monitoring (CEM) system and to retain CEM data, and specifies that CEM data may be used to determine compliance with the emission limit.

Likewise, for volatile organic compound (VOC) surface coating operations where no add-on control is employed but emissions are restricted through limiting VOC contents and quantities of coatings used, emission limits may be used to restrict potential to emit under the following limited circumstances. If the permitting agency determines for a particular surface coating operation that operating and production parameters (e.g. gallons of coating, quantities produced) are not readily limited due to the wide variety of coatings and products and due to the unpredictable nature of the operation, emission limits coupled with a requirement to calculate daily emissions may be used to restrict potential to emit. The source must be required to keep the records necessary for this calculation, including daily quantities and the VOC content of each coating used. Emission limits may be used in this limited circumstance to restrict potential to emit since, in this case, emission limits are more easily enforceable than operating or production limits.

#### IV. Time Periods For Limiting Production and Operation

As discussed above, a limitation specifically recognized by the regulations as reducing potential to emit is a limitation on production or operation. However, for these limitations to be enforceable as a practical matter, the time over which they extend should be as short term as possible and should generally not exceed one month. This policy was explained in a March 13, 1987 memorandum from John Seitz to Bruce Miller, Region IV. The requirement for a monthly limit prevents the enforcing agency from having to wait for long periods of time to establish a continuing violation before initiating an enforcement action.

EPA recognizes that in some rare situations, it is not reasonable to hold a source to a one month limit. In these cases, a limit spanning a longer time is appropriate if it is a rolling limit. However, the limit should not exceed an annual limit rolled on a monthly basis. EPA cannot now set out all inclusive categories of sources where a production limit longer than a month will be acceptable because every situation that may arise in the future cannot now be anticipated. However, permits where longer rolling limits are used to restrict production should be issued only to sources with substantial and unpredictable annual variation in production, such as emergency

boilers. Rolling limits could be used as well for sources which shut down or curtail operation during part of a year on a regular seasonal cycle, but the permitting authority should first explore the possibility of imposing a month-by-month limit. For example, if a pulp drier is periodically shut down from December to April, the permit could contain a zero hours of operation limit for each of those months, and then the appropriate hourly operation limit for each of the remaining months. Under no circumstances would a production or operation limit expressed on a calendar year annual basis be considered capable of legally restricting potential to emit.

#### V. Sham Operational Limits

In the past year, several sources have obtained purportedly federally enforceable permits with operating restrictions limiting their potential to emit to minor or de minimis levels for the purpose of allowing them to commence construction prior to receipt of a major source permit. In such cases where EPA can demonstrate an intent to operate the source at major source levels, EPA considers the minor source construction permit void ab initio and will take appropriate enforcement action to prevent the source from constructing or operating without a major source permit.

The following example illustrates the kind of situation addressed in this section: An existing major stationary source proposes to add a 12.5 megawatt electric utility steam generating unit, and applies for a federally enforceable minor source permit which restricts operation at the unit to 240 hours per year. Because the project is designed as a baseload facility, EPA does not believe that the source intends to operate the facility for only 240 hours a year. Further investigation would probably uncover documentation of the source's intent to operate at higher levels than those for which it is permitted.

This situation raises the question of whether a source can lawfully bypass the preconstruction or premodification review requirements of Prevention of Significant Deterioration (PSD) and nonattainment New Source Review by committing to permit conditions which restrict production to a level at which the source does not intend to operate for any extensive time. If, after constructing and commencing operation, the source obtains a relaxation of its original permit conditions prior to exceeding them, does this constitute a violation of the preconstruction review requirements? This section discusses why it is improper to construct a source with a minor source permit when there is intent to operate as a major source, and provides guidelines for identifying these "sham" permits.



A. Permits with conditions that do not reflect a source's planned mode of operation are void ab initio and cannot act to shield the source from the requirement to undergo preconstruction review.

1. Sham permits are not allowed by 40 CFR Section 52.21(r) (4) Section

52.21(r) (4) states:

At such time that a particular source or modification becomes a major stationary source or major modification solely by virtue of a relaxation in any enforceable limitation which was established after August 7, 1980 on the capacity of the source or modification otherwise to emit a pollutant, such as a restriction on hours of operation, then (PSD) shall apply to the source or modification as though construction had not yet commenced on the source or modification.

When a source that is minor because of operating restrictions in a construction permit later applies for a relaxation of that construction permit which would make the source major, Section 52.21(r) (4) prescribes the methodology for determining best available control technology (BACT). However, it does not foreclose EPA's ability, in addition to the retroactive application of BACT and other requirements of the PSD program, to pursue enforcement where the Agency believes that the initial minor source permit was a sham. EPA will limit its activity to requiring application of 40 CFR 52.21(r) (4) only for the cases where a source legitimately changes a project after finding that the operating restrictions which were taken in good faith cannot be complied with. Whether a source has acted in good faith is a factual question which is answered by available evidence in the particular case.

2. Sham permits are not allowed by the definition of potential to emit:

40 C.F.R. Sections 52.21(b) (4), 51.165(a) (1) (iii), 51.166(b) (4).

The definition of potential to emit enables sources to obtain federally enforceable permits with operational restrictions as a means of limiting emissions to minor source levels. However, implicit in the application of these limitations is the understanding that they comport with the true design and intended operation of the project.

3. Sham permits are not allowed by the Clean Air Act

Parts C and D of the Clean Air Act exhibit Congress's clear intent that new major sources of air pollution be subject to preconstruction review. The purposes for these programs cannot be served without this essential element. Therefore, attempts to expedite construction by securing minor source status through the receipt of operational restrictions from which the source intends to free itself shortly after operation are to be treated as circumvention of the preconstruction review requirements.

B. Guidelines for determining when minor source construction permits are shams.

EPA's determination that a purportedly federally enforceable construction permit is a sham is made based on an evaluation of specific facts and evidence in each individual case. The following are criteria which should be scrutinized when making such a determination:

1. Filing a PSD or nonattainment NSR permit application

If a major source or major modification permit application is filed simultaneously with or at approximately the same time as the minor source construction permit, this is strong evidence of an intent to circumvent the requirements of preconstruction review. Even a major source application filed after the minor source application, but either before operation has commenced or after less than a year of operation should be looked at closely.

2. Applications for funding

Applications for commercial loans or, for public utilities, bond issues, should be scrutinized to see if the source has guaranteed a certain level of operation which is higher than that in its construction permit. If the project would not be funded or if it would not be economically viable if operated on an extended basis

(at least a year) at the permitted level of production, this should be considered as evidence of circumvention.

3. Reports on consumer demand and projected production levels.

Stockholder reports, reports to the Securities and Exchange Commission, utility board reports, or business permit applications should be reviewed for projected operation or production levels. If reported levels are necessary to meet projected consumer demand but are higher than permitted levels, this is additional evidence of circumvention.

4. Statements of authorized representatives of the source regarding plans for operation.

Statements by representatives of the source to EPA or to state or local permitting agencies about the source's plans for operation can be evidence to show intent to circumvent preconstruction review requirements.

Note that if a determination is made that a permit is a "sham" for one pollutant and, therefore, the source is a major source or major modification, the permit may possibly still contain valid limits on potential to emit for other pollutants.

In such cases, the entire source must still go through new source review, during which, for PSD review, all pollutants for which there is a net significant increase must be analyzed for BACT. In nonattainment new source review, new sources must have LAER determinations only for pollutants for which they are major. Major modifications, however, must have LAER determinations for all nonattainment pollutants emitted in significant amounts. If the valid limits in a partially void minor source construction permit keep certain pollutants below significance levels, then those pollutants would not have to be analyzed for BACT or LAER. However, if a source or modification is determined to be major for PSD or NSR because part of its minor permit is deemed void, it would have to undergo BACT or LAER analysis for all significant pollutants.

## VI. Enforcement Procedures

This guidance has discussed permit conditions which will legally restrict potential to emit, shielding a source from the requirement to comply with major new source permitting regulation. Failure by a permitting agency to adhere to these guidelines may result in a permit that does not legally restrict potential to emit, thereby subjecting a source to major new source review. If that source has not gone through preconstruction review, it is a significant violator of the Clean Air Act and is subject to enforcement for constructing or

modifying without a major new source permit.

The enforcement options available to EPA in these situations include administrative action under Sections 167 or 113 (a) (5) of the Act or federal judicial action under Sections 113 (b) (2), 113 (b) (5), 113(c), or 167. Which enforcement option is selected depends on the facts of the particular situation. (See July 15, 1988 guidance on EPA Procedures for Addressing Deficient New Source Permits.)

## VII. Examples

The following examples are provided to illustrate the type of permit restrictions which would and would not legally limit potential to emit to less than major source thresholds. These examples are provided for purposes of clarifying the potential to emit and averaging time guidance only. They are not intended to reflect all the permit conditions necessary for a valid permit. Specific test methods, compliance monitoring and recordkeeping and reporting requirements are necessary to make permit limitations enforceable as a practical matter. The use of examples where averaging times are the longest times allowed under EPA policies is not intended to necessarily condone the selection of the longest averaging times; averaging times should in practice be as short as possible.

1. The minor source construction permit for a boiler contains the following restrictions:  
250,000 gal fuel/month; 0.8% S fuel; 8000 hours/year.

These conditions are federally enforceable production and operation limits, but do not limit potential to emit because one of them does not meet EPA policies on enforceability as a practical matter. The averaging time for hours of operation, one of the operational limits necessary to restrict emissions to less than 250 tpy, exceeds a monthly or rolling yearly limit. If, instead of 8000 hours/year, the hourly restriction were stated as 666 hours/month, the permit would serve to keep the source a minor source, assuming the permit contains appropriate recordkeeping provisions.

2. A waferboard plant which has the physical capacity to emit over 300 tpy of carbon monoxide in the absence of using specific combustion techniques has the following permit restriction as the sole emission limitation: 249 tpy.

This does not limit potential to emit since an operational or production restriction is necessary for the source to be restricted to 249 tpy. The permit must contain a restriction on hours of operation or capacity utilization which, when multiplied by the maximum emission rate for the CO sources at the plant, results in emissions of 249 tpy. Additionally, while the

emission limit alone cannot restrict potential to emit, the emission limit is unenforceable as a practical matter since it is limited on an annual basis. The permit should contain a short term emission limit (in addition to the annual emission limit), consistent with the compliance period or parameter in the applicable test method for determining compliance.

3. A small scale rock crushing plant that cannot emit more than 240 tpy under maximum operation without controls (including plant-wide particulate emissions from transfer and storage operations) has the following permit restriction as the sole emission limitation: 240 tpy particulate matter.

Since no operational limitations are necessary for the source to emit below 250 tpy, no operational restrictions need be in the permit to limit potential to emit. However, although this is not a major source, the state agency should express the emission limit in this permit as a lb/hour measure or gr/dscf so that it will be enforceable as a practical matter.

4. A plant consisting solely of a small rock crusher has the following permit restrictions: 0.05 lb gr PM/dscf; fabric filter must be employed and maintained at 99% efficiency.

Assuming that maintaining the fabric filter at 99% efficiency will result in emissions of less than 250 tpy, this permit would limit



potential to emit if it also contained either 1) parameters that allowed the permitting agency to verify the fabric filter's operating efficiency or 2) a requirement to install and operate continuous opacity monitors (COMs) and a specification that COM data may be used to verify compliance with emission limits. Note that if this second alternative were adopted, it would not be necessary to require that the fabric filter be maintained at 99% efficiency.

To determine potential to emit, the efficiency rate of the fabric filter would be multiplied by the maximum uncontrolled emission rate, the maximum number of operating hours and maximum throughput capacity since there are no other operating or production limits. However, the efficiency rate of the fabric filter would not be enforceable as a practical matter unless there were an enforceable means to monitor ESP performance on a short term basis. The two alternatives mentioned above would satisfy this requirement.

5. A surface coating operation has the capability of utilizing 15,000 gal coating/month, with the following permit restrictions: 3.0 lb VOC/gal coating minus water; 20.5 tons VOC/month; monthly VOC emissions to be determined from records of the daily volumes of coatings used times the manufacturers specified VOC content.

This does not limit potential to emit since the source has the physical capacity to exceed 250 tpy of VOC, and the permit does not contain a production or an operational limitation. A monthly limit on gallons of coating used which when multiplied by 3.0 lb/gal equates to less than the 250 tpy threshold (13,500 gallons/month), with appropriate recordkeeping, would generally be necessary to limit potential to emit. If, however, the permitting agency determines, due to the wide variety of coatings employed and products produced, that restrictions on operation or production are not practically enforceable, then the above emission limits could restrict potential to emit if there are requirements that the source calculate emissions daily, and keep the appropriate records.

If the source was alternatively to meet the 20.5 ton/month limit by employing add-on controls, the permit would need to contain an operational limit, such as the requirement to install and operate an incinerator at 99% efficiency. A requirement to monitor incinerator efficiency (either directly or indirectly via temperature monitoring for example), and appropriate recordkeeping requirements to verify compliance with each of the permit conditions would also be necessary to make the permit conditions enforceable as a practical matter. Note, however, that in the case where add-on controls are employed, the source may be able to meet a shorter term emission limit than the ton per month figure.

#### VIII. Conclusion

We hope this guidance will help EPA Regions identify sources which have the potential to emit major amounts of an air pollutant which will subject those sources to the requirements of preconstruction new source review. Every source which is subject to these requirements but has not obtained a major new source permit should be seriously considered for enforcement action.